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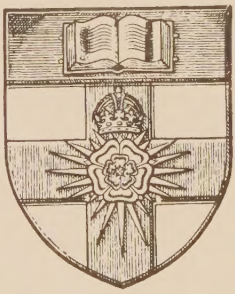

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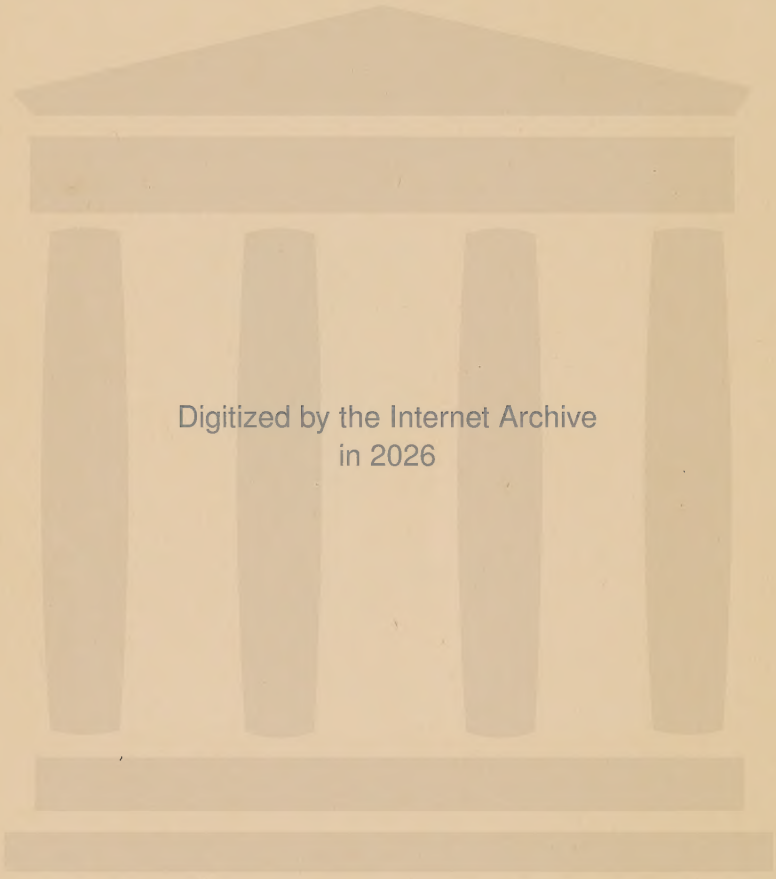

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LAW REPORTS.

Court of Common Pleas.

REPORTED BY

JOHN SCOTT AND EDMUND LUMLEY,

BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. X.

FROM MICHAELMAS TERM, 1874, TO TRINITY TERM, 1875,

BOTH INCLUSIVE.

XXXVIII VICTORIA.

LONDON:

Printed for the Incorporated Council of Law Reporting for England and Wales

BY WILLIAM CLOWES AND SONS,

DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.

PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1875.

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OF

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CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

MICHAELMAS TERM, XXXVIII VICTORIA.

DANIELS *v.* HARRIS.

1874
Nov. 2.

Marine Insurance—Seaworthiness—Deck Cargo.

The warranty of seaworthiness implied in a contract of marine insurance is a warranty that the ship is seaworthy for the purposes of the particular subject-matter of the insurance. Therefore, in the case of a policy of insurance on deck cargo, it is not a compliance with the warranty of seaworthiness that the ship is fit to encounter ordinary rough weather with safety to herself because the deck cargo is such as may be readily jettisoned in such weather.

10 L x 123

ACTION upon a policy of marine insurance. The facts, pleadings, and arguments of counsel sufficiently appear from the judgment. At the trial before Brett, J., the jury found a verdict for the plaintiff for the amount claimed.

A rule nisi for a new trial on the ground of misdirection was obtained, against which

Benjamin, Q.C., and *Arbuthnot*, shewed cause.

Sir J. Karslake, Q.C., *Butt, Q.C.*, and *Cohen, Q.C.*, supported the rule.

[The following authorities were cited: *Foley* v. *Tabor* (1); *Bur-*

(1) 2 F. & F. 663.

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ges v. *Wickham* (1); *Quebec Marine Insurance* v. *Commercial Bank of Canada* (2); *Weir* v. *Aberdeen* (3); *Lidgett* v. *Secretan* (4); *Biccard* v. *Shepherd* (5); *Gibson* v. *Small* (6); *Bouillon* v. *Lupton* (7); *Lyon* v. *Mells* (8); *Stanton* v. *Richardson* (9); *Prescott* v. *Union Insurance Company.* (10)]

Cur. adv. vult.

Nov. 2. The judgment of the Court (Lord Coleridge, C.J., Brett and Denman, JJ.), was delivered by

BRETT, J. In this case the action was brought on a policy of insurance, to recover an alleged total loss by jettison of wine, valued at 7000*l.*, loaded on board the steamship *Murillo*.

The policy was "at and from St. Lucar, on wine in casks on or under deck." The wine insured was all on deck, so loaded at St. Lucar after the ship's hold had been filled up with other cargo. The insured wine was jettisoned in bad weather by staving in the casks. The ship and under-deck cargo arrived safe.

The defendants pleaded, with other pleas, "that the said ship at the commencement of the said insured voyage in the said policy mentioned was not seaworthy."

In summing up the case to the jury upon this plea, Mr. Justice Brett commenced by telling them "that the question was whether the defendant had proved that the ship was unseaworthy." "But that means," he said "not only whether the mere ship as a built ship was seaworthy, but whether, loaded as she was with the cargo which she had on board stowed in the way it was, the ship was fit to undergo all the ordinary risks of the voyage upon which she was to sail, at the time of year at which she was to sail. If the ship was not seaworthy in that sense, then the policy fails, because the assured of goods is taken to warrant that the ship is seaworthy. It signifies not whether he is innocent, whether it is in the least degree his fault, if in point of fact the shipowner or the master makes the ship by stowage or otherwise unseaworthy, then, in treating the case as between the two innocent parties, the assured

(1) 3 B. & S. 669; 33 L. J. (Q.B.) 17.
(2) Law Rep. 3 P. C. 234.
(3) 2 B. & Ald. 320.
(4) Law Rep. 6 C. P. 616.
(5) 14 Moo. P. C. 471.
(6) 4 H. L. C. at p. 419.
(7) 15 C. B. (N.S.) 113; 33 L. J. (C.P.) 37.
(8) 5 East, 428.
(9) Law Rep. 7 C. P. 421.
(10) 1 Whart. Penn. 399.

and the underwriter, it is the assured, and not the underwriter, who has to lose. The question is not whether the goods themselves were at more than ordinary risk: goods on deck are always assumed to be at more than ordinary risk. If the fact of their being on deck does not affect the safety of the ship, their own additional risk is immaterial: the question is whether the putting the goods on deck did or did not make the ship unseaworthy. The question for you is whether the ship, that is, including the cargo on and under deck, was in a fit condition on leaving St. Lucar to encounter with safety the ordinary perils of an ordinary voyage from St. Lucar to England at that time of the year. Your answer must depend upon the view you take of the evidence, and upon the exercise of your own knowledge and judgment."

The learned judge, in commenting on the evidence, said: "No one would be of opinion that either for the cargo itself or for the ship it is as good a way to load cargo on deck as to put it under deck: but does it or does it not make a great difference, in your judgment, what kind of deck cargo there is? If the deck cargo had been stiff machinery, heavy rigid machinery, which could not have been got rid of from off the deck in bad weather, if the weight of such a cargo had been anything like the weight of this wine, you would probably say that, with such a weight on deck, and the impossibility of getting rid of it, the state of things would have been very dangerous for the ship: but then the real point for you is, whether you think it makes a difference in that respect that the cargo could be dealt with as this cargo could be. The weight of it, as weight, was liquid. How would you get rid of wine incumbering the ship on deck? How long would it take the ship's carpenter and his men to stave the casks? What would be the effect on the ship of letting the wine run out? The question is, not of danger to the wine, but of danger to the ship. I apprehend myself that you will all be of opinion that having this deck cargo did add to the difficulties of the ship, and that, unless it could have been got rid of, and with tolerable quickness, it would have been a danger to the ship to the extent of making her unseaworthy. But the question is, what is the effect, in your judgment, of the facility of starting the wine. I cannot help thinking that the fact of having a deck cargo does necessarily add to the danger of a

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ship; but the question is, whether it puts her into so much danger as to make her unseaworthy, that is to say, whether it puts her in danger of being unable to meet the ordinary rough weather of the voyage on which she is sailing."

Speaking of what would be an ordinary voyage in this case, the learned judge said: "It would not be right to say that, for a ship coming across the Bay of Biscay in February, an ordinary voyage means a voyage without rough weather. It is clear that, coming across the Bay of Biscay and up the English Channel at that season, you must meet with rough weather. Therefore it is not to be taken to be sufficient that the ship would be able to encounter without danger smooth or fair weather, but the question is whether she would be able to encounter without danger rough weather also. But there is at every season of the year some weather rougher than the ordinary rough weather of that season; and, although the ship ought to be able to stand, not only the smooth, but also the ordinary rough weather of the season in which she sails, yet the value of insurance is that it insures against damage or loss by reason of the rougher weather than the ordinary rough weather of the season. Therefore you are not to consider whether this ship would have been safe without rough weather: she was bound when she left St. Lucar to be in such a condition with regard to herself and her cargo as to be able to surmount the ordinary occurrences of an ordinary voyage in that season, including the rough weather, which must be anticipated at that time of year: and the question for you is this,—It being a fact clearly proved, as I think, that, if the cargo could not have been got rid of, the ship would have been in great danger in a voyage with the ordinary rough weather of the season, the question is whether your view of that state of things is modified by a consideration of what kind of cargo it was on deck, and the mode in which such a cargo could be got rid of. If you are of opinion that that kind of cargo, although it was too heavy for the comfort of the ship, and as long as it existed of that weight was a danger to the ship, yet, when ordinary danger came on, that is, the ordinary rough weather came on, it could be got rid of so quickly that practically it did not endanger the ship, although it endangered itself; then you may say that the ship was seaworthy, notwithstanding the weight of the cargo on deck. But,

if you think that the cargo was such that, with such weather as ought to have been anticipated on such a voyage, it could not have been got rid of before the ship would be in danger, then I think you would say that the ship was unseaworthy at starting. If you think the ship was not seaworthy at starting from St. Lucar, within the definition I have given, you will find for the defendant; otherwise for the plaintiff."

The jury having found a verdict for the plaintiff, a rule was moved for and granted on the ground of misdirection; and the case was argued in Easter Term last.

The first point to be considered seems to be, what would be the exact import conveyed to the jury by this summing-up. In laying down the propositions of law, as such, we are of opinion that the direction was correct. The first proposition laid down as to seaworthiness seems to us to be entirely right. The terms of the proposition as to what is to be considered an ordinary voyage seem to us to be right. The question is, what is the effect of the remarks made during the comment on facts. We are of opinion, upon consideration, that they would lead the jury to conclude that they were directed, as matter of law, that, although they should find, as matter of fact, that, if the deck cargo were not got rid of, the ship with the cargo under and on her deck would be in danger of destruction in the ordinary rough weather of the voyage insured, yet, if the deck cargo could in such weather be got rid of so easily that by reason of the facility of its destruction the ship and the rest of the cargo were in no danger in an ordinary voyage, they might find that the warranty that the ship was seaworthy was satisfied in point of law. The real question therefore is, whether such a proposition is correct in point of law.

The stipulation as to seaworthiness is a warranty, not expressed, but implied. It is, unless expressly or by necessary implication negatived, to be implied in every marine voyage policy of insurance, whether the subject-matter of insurance be ship, cargo, freight, profits, commission, or other. The warranty thus implied has always been stated in all decided cases and in all works of authority in the same terms. Those terms are, "that the assured warrants that at the time when the policy attached or should have attached the ship was seaworthy." It is not "that the

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subject-matter of insurance would be in no danger on an ordinary voyage:" the terms which have been used are not, in a policy on cargo, for example, "that such cargo will be in no danger, if the voyage be an ordinary voyage;" but they have been that, for such a voyage, "the ship was seaworthy." The same terms being so used with regard to all policies, do they mean the same thing in all policies? If they were express words in the policy, being the same words used in documents in pari materiâ, it should seem that they should bear the same meaning in all. Is it different because the warranty is an implied one, and the terms which have been used have not been the phraseology of the parties to the contract, but of those who have declared or treated of the law?

When one asks whether the warranty has the same meaning in all the policies, the question is whether the same warranty in extent and effect is to be implied in every policy. In considering this question, we must proceed as in all the other questions which are for ever raised for judicial decision by the never-ceasing variety of commercial transactions: we must proceed according to authority so far as it goes, and then, if the case in hand be outside and beyond the authorities, by applying to it the principles to be extracted from the authorities, that is to say, the principles which were applied to them in their time.

First, then, according to the authorities, has the implied warranty been the same in extent and effect in all policies? It has not. With regard to policies on the same subject-matter, as, on ship, the extent of the warranty as to the condition of the ship has been held to be different for different voyages, for the same voyage at different seasons, for the same voyage at the same season according to whether the same ship was in ballast or loaded with one kind of cargo or another. The required condition of the ship has been held to be different when the ship was to enter under policy in port from what it must be when going to sea under the same policy. It has been held to be different for a coasting voyage, or lake, or river, or canal voyage, from what it must be for an ocean voyage under the same policy. It is unnecessary to cite fully well-known authorities. All are brought forward and discussed in Phillipps on Insurance, ss. 695 to 723 inclusive. In s. 719 it is said: "The warranty of seaworthiness varies in dif-

ferent places: a vessel considered seaworthy for a voyage in one place may not be so considered in another: the standard of seaworthiness also varies from time to time in the same place." In s. 720, "The requisites as to seaworthiness depend upon the intended use and service of the vessel. The requisites to satisfy this warranty for lying in port, or for temporary purposes, short coasting passages, or navigating a lake, river, or canal, are different from those demanded for navigating the open sea on long voyages." If, therefore, the warranty were set out in detailed terms, instead of in the comprehensive description "that the ship must be seaworthy," it is obvious that the terms of the warranty as to each of the voyages, or, as it were, parts of voyages, or conditions of things mentioned in these sections, would and must be different. If, then, the implied warranty is as to its extent and effect different in different policies, with regard to the same subject-matter, it might be not unreasonably predicated that it might be also different in different policies, with regard to different subjects. It might be different with regard to the same voyage to be made at the same season, if applied to two different subjects of insurance. There seems to be authority for saying that there is a difference. In Phillipps on Insurance, s. 721, it is said: "It follows, if we apply the same criterion, that there may be a compliance with this warranty in a policy on the ship while lying in port, and not one upon the cargo of the same ship; for, circumstances may be readily imagined, and often occur, in which the vessel is in reasonable security in port, though goods on board would not be so." In s. 723: "There are, then, two distinctions in the insurance on the ship and that on cargo and freight,—first, in respect of what is seaworthiness in port,—and second, as to the time when the policy attaches: and these two distinctions have place, though all these interests are insured in the same policy made or having reference to the time before the cargo is on board." Mr. Phillipps then points out that, in two cases determined in Massachusetts on a policy on ship, freight, and cargo at and from a port, the policy on the ship attached because the ship was seaworthy in port; but the policy did not attach as to the cargo or freight, because the ship was not seaworthy for the sea voyage,—the warranty as to seaworthiness being as to all the risks—

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the warranty to be implied in the one policy. These are authorities for saying that there is a difference in extent and effect in the warranty of seaworthiness of the ship in different policies in which the subject-matter of insurance is different: but there is no authority which decides what is the extent and effect of that warranty in the case of a policy on goods.

10 L. R. 123.

The real question, therefore, is, what is the principle to be applied; and upon this, first, what is the principle which governs the Courts in determining whether any terms are to be implied in contracts, and, if so, what those terms are to be. When and to what extent is a Court of law bound to hold that there is an implied term in a contract? Whenever there is something not expressed which it is clear to all men of ordinary intelligence and knowledge of business must have been either latently in or palpably present to the minds of both parties to the contract when it was made; for, otherwise, their contract would be, as a business transaction, insensible or contrary to the universal course.

Applying the authorities, so far as they go, and this principle, to the present case, it would seem that, if the policy had been on the ship, it might well have been held that the extent and effect of the implied warranty would only have reached the safety of the ship, that is to say, if the cargo on deck would, however treated, have been a danger to the ship in an ordinary voyage, the warranty of seaworthiness would not have been satisfied; but if the deck cargo, by reason of the facility with which it could be got rid of, would have caused no danger to the ship, the warranty would have been satisfied. The same, if the policy had been on cargo other than the deck cargo; for, in either case, upon the assumption, neither ship or cargo insured would have been in any practical danger on an ordinary voyage. The only consideration against the affirmative in either case is, that the safety of the subject insured is made to depend upon a breach of duty by the shipowner to the owner of the deck cargo; yet that, as between the parties to the contract of insurance, would be res inter alios acta, and the underwriter would not be the legal defender of the owner of the deck cargo. Upon either of the policies thus suggested, we should have thought the direction which was given in this case to have been correct. But there arises the final question, which is,—can

the same effect and extent be given to the warranty with regard to a cargo which is the subject-matter insured? Can it be supposed that the underwriter would insure at any premium cargo which upon the assumption must be jettisoned if the ordinary rough weather of the voyage should occur? or, on the contrary, may it not be said to be clear to every man of ordinary intelligence and knowledge of business, that neither the assured or the underwriter on such a policy could have had in his mind when the contract was made the supposition that this underwriter would pay for the loss by inevitable jettison of the subject insured? In other words, must not the extent and effect of the warranty in such a policy on goods be, that the ship will be safe on an ordinary voyage, without being put to sacrifice the insured cargo?

We are of opinion, upon consideration, that the extent and effect of the warranty that the ship is seaworthy, in a policy on cargo, can never be implied to be so great as to be considered to contemplate the destruction, in order to save the ship, in an ordinary voyage, of that very cargo which is the subject-matter of insurance. Such a supposition makes the contract as a business transaction insensible. The extra premium invariably paid in respect of a deck cargo applies to the extra danger to the cargo in case of weather more rough than the ordinary rough weather of the voyage insured.

We are, therefore, of opinion that the direction in this case was wrong, as applied to the policy before the Court. It was right in saying that the question was not whether the cargo would be safe on an ordinary voyage, but whether the ship, including the cargo, would be safe. It was right in saying that, in considering that question, the jury should consider the nature of the cargo. But it was wrong in leading or leaving the jury to understand, that, if the ship could only be made safe for or in an ordinary voyage by the destruction of the insured cargo, they might nevertheless say that the ship was seaworthy.

The rule must be made absolute for a new trial.

Rule absolute.

Attorneys for plaintiff: *Argles & Rawlins.*
Attorneys for defendant: *Hollams, Son, & Coward.*

1874
Nov. 19.

ELLIS *v.* THE LOFTUS IRON COMPANY.

Trespass—Animal, Owner liable for trespass of—Negligence.

1 QBD 80
10 QBD 18

The defendants' horse having injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendants':—

Held, that there was a trespass by the act of the defendants' horse, for which the defendants were liable, apart from any question of negligence on the part of the defendants.

APPEAL from the county court judge of Glamorganshire.

The case as stated on appeal was as follows:—

The action was brought to recover 50*l.* for injuries to the plaintiff's mare caused by the defendants' negligence.

The plaintiff was the occupier of a farm in the parish of Llansarran, and by arrangements between the plaintiff's landlord, the plaintiff, and the defendants, a portion of a field of the plaintiff's farm was let to the defendants for the execution of certain works, and a plot was fenced in by the defendants by means of a wire fencing.

The plaintiff's land, which adjoined the part taken by defendants, was used by him as grazing land for horses and cattle to the knowledge of the defendants.

The defendants were possessed of an entire horse, used by them as a draught cart-horse, and on Sunday, the 18th of August, this horse was turned into the plot occupied by the defendants. The plaintiff had full knowledge of the condition of the fence surrounding it. The mare grazed in the remaining portion of the field adjoining that portion occupied by the defendants. The defendants' horse had been turned out on former occasions on the same plot and had always been watched. The horse of the defendants and one of the plaintiff's mares got close together on either side of the wire fence, and the horse by biting and kicking the mare through the fence committed the injury complained of, the damage being taken at 15*l.*

It was proved that the defendants' horse did not trespass on the land of the plaintiff by crossing the fence. Both animals were close to the fence when the injury happened. There was no

evidence that the horse was of a vicious temper, or had bitten or kicked any animal before; on the contrary, it was stated that the horse was as quiet a temper as you would ever wish a horse.

The plaintiff had warned the defendants to keep the horse away from his mares.

The judge being of opinion there was no trespass, and that the damage was too remote, held there was no case for the jury.

The question for the Court was, whether the plaintiff was entitled to recover from the defendants for the injuries caused as aforesaid, the horse being a stallion.

Field, Q.C. (with him *B. Francis Williams*), for the plaintiff. There was certainly a trespass in this case, and the damages were not too remote. It is clear that some portion of the horse's body passed over the boundary line between the plaintiff's and the defendants' land when the injury was inflicted. The law is well established that the owner of an animal is responsible if the animal does that which if done by the owner himself would have been a trespass apart from any question of negligence. [He cited *Lee* v. *Riley* (1); *Cox* v. *Burbidge* (2); *Read* v. *Edwards* (3); Com. Dig. title Trespass, C.; Chitty on Pleading, 7th ed. vol. i. p. 93.]

Grantham (with him *Charles Hall*), for the defendants. The authorities which appear to bear out the plaintiff's proposition are cases of acts done by animals in consequence of dangerous or vicious propensities, either natural to the animal or known by the defendant to exist; such cases are distinguishable from the present. In such cases it is negligence on the part of the defendant not to insure, by the necessary precautions, against the animal's doing the act. It is natural to an animal to stray, therefore the owner must keep him in. It is contended that negligence is necessary to render the owner of the animal liable for the animal's act. Here there is no evidence of negligence on the defendants' part. The plaintiff was equally guilty of negligence if there were any on either side. [He cited *Star* v. *Rookesby* (4);

(1) 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.

(2) 13 C. B. (N.S.) 430; 32 L. J. (C.P.) 89.

(3) 17 C. B. (N.S.) 245; 34 L. J. (C.P.) 31.

(4) 1 Salk. 335.

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ELLIS v. LOFTUS IRON CO.

Blackman v. *Simmons* (1); *Erskine* v. *Adeane* (2); *Jenkins* v. *Turner*. (3)]

Field, Q.C., in reply.

LORD COLERIDGE, C.J. The judgment of the county court judge must, I think, be reversed, on the ground that there was evidence of a trespass, and the damages were not too remote. I cannot say I entertain any doubt in the matter. It is clear that, in determining the question of trespass or no trespass, the Court cannot measure the amount of the alleged trespass; if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it. It has, moreover, been held, again and again, that there is a duty on a man to keep his cattle in, and if they get on another's land it is a trespass; and that is irrespective of any question of negligence whether great or small. In this case it is found that there was an iron fence on the plaintiff's land, and that the horse of the defendants did damage to that of the plaintiff through the fence. It seems to me sufficiently clear that some portion of the defendants' horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass in law. The only remaining question is, whether the damages were too remote? I cannot see that they were; they were the natural and direct consequence of the trespass committed. These considerations would dispose of the case, but apart from any technicalities of law, it seems to me that the merits are in the plaintiff's favour. It appears that a piece of land was railed off for the defendants' convenience, and the plaintiff being in the habit of keeping mares on the adjoining land previous to this accident, the defendants' stallion had always been watched. Therefore without saying that there was any gross negligence or carelessness on defendants' part, I think there was some default on their part, without which the accident would not have happened. It is not necessary for me to discuss the authorities that have been cited at length. I will only say that *Lee* v. *Riley* (4) is a very strong authority for our

(1) 3 C. & P. 138.

(2) Law Rep. 8 Ch. App. 756.

(3) 1 Ld. Raym. 109.

(4) 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.

present decision. For these reasons I am of opinion that our judgment should be for the plaintiff.

KEATING, J. I am of the same opinion. The county court judge appears to have held that the facts as stated did not amount to evidence of an actionable wrong on the part of the defendants. There seems to me, however, to be abundant evidence that the defendants' horse committed a trespass for which the defendants are liable. The horse, it is found, kicked and bit the mare through the fence. I take it that the meaning of that must be that the horse's mouth and feet protruded through the fence over the plaintiff's land, and that would in my opinion amount in law to a trespass. If evidence of negligence was necessary to constitute a trespass in this case, in my opinion there is abundant evidence of negligence on the defendants' part, and none on that of the plaintiff. The defendants erected the fence, and turned the horse into the field for their own convenience; they had ample warning with respect to the danger, and in consequence of such warning they had the horse watched on previous occasions, but failed to do so on the occasion when the damage was caused.

BRETT, J. I must confess I did entertain some doubt on this matter. The questions are whether there was any evidence of a trespass on the plaintiff's land, for which the defendants would be liable, and if there was, then, whether the damage is too remote. I had no doubt that if there was evidence of negligence, and as a result of such negligence an animal of the defendants passed wholly or in part on to the plaintiff's land, such a circumstance would constitute a trespass; but what I did doubt for some time was, whether, where there was no negligence at all on the part of the defendants, the same consequence would follow. Having looked into the authorities, it appears to me that the result of them is that in the case of animals trespassing on land the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass. Blackstone, 16th ed. vol. iii. c. 12, p. 211; Chitty on Pleading, 7th ed. vol. i. p. 98; and Comyns' Digest, title Trespass C. are all authorities to this effect. If, however, it were

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necessary that there should be evidence of negligence, I cannot say that I should go the length that my Brother Keating did in saying that there was abundant evidence of negligence, though I think there was some evidence. That would be sufficient to support our judgment in any view of the law, but I put my judgment on the ground that by law there was a trespass in this case without evidence of negligence. That being so, the question remains whether the damages were too remote. The case of *Lee* v. *Riley* (1), is a distinct authority to the contrary, and the American case of *Vandenburgh* v. *Truax* (2), quoted in the notes to *Vicars* v. *Wilcocks* (3), is to the same effect.

DENMAN, J. I rather agree with my Brother Brett as to the amount of the evidence of negligence in this case. I am by no means clear that there was such evidence of negligence, as, if it was necessary to prove negligence, would have properly entitled the plaintiff to a verdict. The county court judge appears to have nonsuited the plaintiff on the ground that there was no trespass, and the damages were too remote. Now, during the early part of the argument I thought it a very strong thing to say that whenever any part of an animal passed over or through a fence, inasmuch as the same act, if done by a man, might technically be a trespass, therefore there was a trespass on the part of the owner of the animal. But after hearing the authorities cited, and especially the case of *Lee* v. *Riley* (1), and the passages from Comyns' Digest and Chitty on Pleading, it appears to me that they undoubtedly bear out that view.

It seems hard, when two parties have adjoining lands with a fence between them, and a quarrel arises between the animals on either side of the fence, one party should be liable for the consequences, though not in reality guilty of default or neglect any more than the other party, by reason of the application to the mere act of an animal of the technical rule, Cujus est solum ejus est usque ad cælum. I must say, however, that I cannot see, upon the authorities, any escape from the conclusion that it must be so. The only remaining point is whether the damages were too remote.

(1) 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.

(2) 4 Denio, 464.

(3) 2 Sm. L. C. p. 499, 6th ed.

As to that, I agree with the rest of the Court that the case of *Lee* v. *Riley* (1) is conclusive. (2)

Judgment for the plaintiff.

Attorneys for plaintiff: *Ridsdale, Craddock, & Ridsdale.*
Attorneys for defendants: *Renshaw & Rolph.*

MORGAN AND ANOTHER *v.* BAIN AND ANOTHER.

Nov. 22.

Sale of Goods—Insolvency—Rescission.

The defendants had, on the 5th of February, sold to the plaintiffs 200 tons of iron, to be delivered twenty-five tons monthly at 5*l.* per ton, net cash, or by four months bill with 2*s.* 6*d.* per ton added. By the usage of trade no delivery was due under this contract till the 1st of April. On the 12th of March the plaintiffs found themselves to be insolvent, and they gave notice of the fact to the defendants. On the 16th of March they filed a petition in the bankruptcy court for liquidation by arrangement or composition. The usual course of business under previous contracts between the parties of a similar description was for the defendants to deliver upon such contracts without further demand of delivery. No delivery, however, was made by the defendants or claimed by the plaintiffs in April. On the 5th of April, at the first meeting of the creditors, a resolution was passed to accept a composition of five shillings in the pound. Though the existence of the contract was mentioned at the meeting, no mention was made of it in the written statement of the plaintiffs' affairs. No step was taken in relation to the contract by either party until the 13th of May, when the market for iron having risen, the plaintiffs claimed the delivery of iron in fulfilment of the contract, offering and being ready to pay cash for it. The defendants replied, stating that the plaintiffs having failed to perform their part of the contract there was an end of it. The plaintiffs thereupon brought an action against the defendants for non-delivery of the iron :—

Held, that the effect of the facts was that there had been a rescission of the contract before the 13th of May, the conduct of the plaintiffs having been such as to justify the defendants in the belief that the plaintiffs intended to abandon the contract upon their insolvency, and there being evidence that the defendants in such belief had likewise abandoned it.

Ex parte Chalmers (Law Rep. 8 Ch. 289) followed.

SPECIAL case, of which the facts were in substance as follows :—The action was brought to recover damages for the breach by the

(1) 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.

(2) The cases of *Millen* v. *Faudrye*, Poph. 161, and *Glenham* v. *Hanby*, 1 Ld. Raym. 739, and the dictum attributed to Holt, C.J., in *Mason* v. *Keeling*, 1 Ld. Raym. 608, seem to shew that the doubt indicated by Brett and Denman, JJ., existed also at the time when those cases were decided, though from the reports of the two first-mentioned cases it is difficult to gather what exactly was the point involved.

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defendants of a contract for the delivery to the plaintiffs of 200 tons of hæmatite pig iron, at the price of 5*l.* per ton. The plaintiffs were manufacturers of sheet iron and tin plate at Kidderminster, and the defendants were manufacturers of hæmatite pig iron at Harrington, Cumberland. The contract was made by the following letters:—Defendants to plaintiffs, 3rd February, 1872:—"As we have now a small stock of your quality of pigs at Salbuiry, if you wish for more than the twenty-five tons for this month please advise us. There is a likelihood of a further advance in price, but if you wish us to book 100 or 200 tons more at last figure, on hearing from you by return we shall do so." Plaintiffs to defendants, 5th February, 1872:—"Please send us 200 tons of our usual quality of pigs, delivered at twenty-five tons monthly; acknowledgment of this will oblige." Defendants to plaintiffs, 6th February, 1872:—"We are favoured with your order of yesterday for 200 tons No. 3 hæmatite pig iron, and which shall have our most careful attention." The price spoken of in the defendants' letter of the 3rd of February as "last figure" was 5*l.* per ton net cash, or by four months bill with 2*s.* 6*d.* per ton added.

Before the making of this contract the defendants had sold and delivered other iron to the plaintiffs, and on the 1st of March, 1872, they delivered to the plaintiffs twenty-five tons of iron, which completed the deliveries due under contracts previous to the one in question in this action. On the 7th of March, the defendants drew upon the plaintiffs a bill of exchange for 148*l.* 15*s.*, payable four months after date for the price of the said twenty-five tons of iron and carriage of the same, and this bill the plaintiffs accepted, and returned on the 8th of March.

At the time of the making of the contract in question, the plaintiffs were insolvent. They were aware during the time that they were in difficulties, but it was not till the 12th of March that they found that they could not meet their liabilities. On the said 12th of March they determined to suspend payment. The following correspondence then passed between the plaintiffs and Messrs. Day & Ivens, their solicitors, and the defendants. Plaintiffs to defendants, 14th March, 1872:—"We regret to inform you that an investigation into our affairs has convinced us of the

necessity of suspending payment. A statement will be submitted to you at the earliest possible moment. In the meantime our solicitors, Messrs. Day & Ivens, will furnish you with any information." Defendants to plaintiffs, 15th March, 1872:—"We have yours of yesterday, and are very much surprised at what you state. We write by same post to your solicitors." Defendants to Messrs. Day & Ivens, 15th March, 1872:—"Those gentlemen of whom we are creditors inform us that they are obliged to suspend payment, and refer us to you for information. Will you therefore kindly advise us what the estate is likely to shew?" Day & Ivens to defendants, 16th March, 1872:—"As the accounts are as yet only made out up to Christmas, we cannot say exactly what the estate shews, but do not think it can exceed 6*s.* 8*d.* in the pound. This is after making allowance for payment of the secured creditors. The bank is fully secured by mortgage on the works and some policies. The ordinary liabilities on bills are 7500*l.*, on open account 4000*l.* We shall be happy to furnish you with further information if you wish it as soon as the accounts are ready."

On the 16th of March the plaintiffs filed a petition in the form provided by the general rules made in pursuance of the Bankruptcy Act, 1869, and as provided by the said Act, stating that they were unable to pay their debts, and were desirous of instituting proceedings for liquidation of their affairs by arrangement or composition with their creditors. At the time of the filing of the said petition the plaintiffs had made no demand for the delivery of any iron under the contract in question, and none had been delivered. For the purposes of this argument it was to be taken that it was the usual practice of the defendants in their dealings with the plaintiffs to deliver iron under such contracts without any further demand.

On the 16th of March, by order of the Bankruptcy Court, George King Patten, an accountant, was appointed to collect, get in, and receive the property and to manage the business of the plaintiffs, and by the same order it was ordered that he should take immediate possession of such property and business, and that he should pass his accounts at such time as might be directed by the registrar of the court. Mr. Patten at once proceeded to take possession, and act under this order, and to carry on the business.

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On the 5th of April, at the first meeting of the creditors of the plaintiffs, duly summoned, convened, and held under and in pursuance of the said Act and rules, a resolution to accept a composition of 5*s.* in the pound, payable by instalments on the 19th of July and the 19th of October respectively, was duly carried and filed, and at a second meeting duly summoned and held on the 18th of April, this resolution was confirmed in manner by the said Act and rules required, and such confirmation was duly filed. The defendants proved, previously to the first meeting, for the full amount of the bills of exchange of the plaintiffs held by them as aforesaid, that is to say, for the sum of 884*l.* 12*s.* 4*d.* and their proof was filed with the proceedings, and 110*l.* 11*s.* 6*d.* being the first instalment of the said composition, was upon the said 9th of July last paid to them upon the amount of their said debt, and on the 4th of October, 1872, 110*l.* 11*s.* 6*d.*, being the second and last instalment of such composition, was paid to them.

The plaintiffs did not in their written statement of affairs make any mention of the contract now sued upon, or any claim in respect of it, but the contract was mentioned at the first meeting of creditors, and known to those present at that meeting. The defendants were not present or represented at that meeting.

On the 1st of May, three new partners joined the plaintiffs in their business, and the name of the firm was changed, but the business was continued as before.

On the 13th of May, the plaintiffs' attorneys sent the following letter to the defendants. "There are 150 tons of pigs purchased of you by Morgan & Ransom in February last yet to be delivered: be good enough to let them be sent as early as possible to the Stour Vale Works, and cash will be sent on receipt of invoice."

The defendants replied as follows: "In reply to yours of yesterday, the bankrupts having failed to perform their part of the contract, there is an end to it."

In the letter of the 13th of May, 150 tons was an error for 200, and this was corrected by letter soon after.

The defendants have, ever since the 14th of May, totally repudiated the contract. The plaintiffs were ready and willing to pay cash for the iron if the defendants had delivered it in accordance with the request contained in the above letter of the 13th of May.

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The market prices of similar iron to that which was so contracted for as aforesaid were as follows: In March 5*l.* 10*s.* per ton; in April and May 6*l.* per ton; in June and July 7*l.* per ton; and in August, September, and October, 6*l.* per ton.

The questions for the opinion of the Court were:

1. Whether the plaintiffs were entitled to maintain the action in respect of the defendants' refusal to deliver subsequent to the filing of the plaintiffs' petition.

2. Whether the plaintiffs were entitled to maintain the action in respect of the non-delivery of iron prior to the filing of the petition.

The Court were to have power to draw all inferences of fact. (1)

Dowdeswell, Q.C. (*Jelf*, with him), for the plaintiffs. The contract was a subsisting contract on the 13th of May. The mere failure to pay for one instalment of a quantity of iron to be delivered monthly does not put an end to the contract: *Freeth* v. *Burr* (2); *Simpson* v. *Crippin.* (3) So, also, insolvency and the proceedings for a composition did not put an end to the contract. To hold that they did, would be to prevent one of the principal objects of the clauses of the Bankruptcy Act providing for compositions. The intention was that, if such an arrangement were considered beneficial by the creditors, the business of the insolvent should be carried on. If the effect is to be that all persons with whom the insolvent has made contracts in the course of business are released, it is impossible that the business should be carried on. The effect of the insolvency is only to give the vendor a right to refuse delivery on credit, and to hold the goods unless cash be tendered: *Gibson* v. *Carruthers.* (4)

[He also cited *Wilkes* v. *Reynolds* (5); *Bloomer* v. *Bernstein* (6); *Lawrence* v. *Knowles.* (7)]

Staveley Hill, Q.C. (*J. O. Griffits*, with him), for the defendants. Admitting that insolvency would not per se put an end to the con-

(1) In addition to the above facts it was admitted in argument that by the usage of the iron trade no delivery would be due on the contract until the 1st of April.

(2) Law Rep. 9 C. P. 208.
(3) Law Rep. 8 Q. B. 14.
(4) 8 M. & W. 321.
(5) 2 B. & Ad. 882.
(6) Law Rep. 9 C. P. 588.
(7) 5 Bing. N. C. 399.

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tract, the question here is, whether the facts do not shew that upon the insolvency the parties intended to rescind the contract. The fact that no claim was ever made by the plaintiffs or by the receiver, and that the contract, though mentioned at the meeting of creditors, was never introduced into the statement of affairs, is enough to shew that the plaintiffs did not intend to go on with the contract in April. If the plaintiffs upon their insolvency intended to go on with the contract, they ought to have intimated to the defendants that they should be prepared to do so, and to pay cash for the iron. As they did not do so, the defendants might reasonably presume that they could not and did not intend to proceed with the contract. The question, according to the effect of the authorities in such a case, is whether the purchaser has by his conduct given the vendor reasonable grounds for supposing that he intended to abandon the contract. If so, the vendor is entitled to rescind. *Ex parte Chalmers* (1) is a strong authority in the defendants' favour.

Dowdeswell, Q.C., in reply. The facts do not amount to evidence of a rescission. The notice of insolvency given by the plaintiffs only applied to inability to meet present debts: it was no declaration of inability to carry on business in future. The very object of an arrangement by composition is that the business should be carried on. The fact that the receiver made no claim under the contract is immaterial; he was not to be a trustee in bankruptcy; no property vested in him. He is only to exercise some supervision over the estate in the interests of the creditors. The non-introduction of the contract into the statement exhibited at the meeting proves nothing; that is merely a statement of assets. If the defendants had offered delivery on the 13th of May, and the plaintiffs had refused it, what defence could the plaintiffs have had to an action for such refusal?

LORD COLERIDGE, C.J. I am of opinion that our judgment should be for the defendants. Assuming that what was stated in the course of the argument as to the usage of the iron trade was correct, and that the first monthly delivery under the contract would not be due until the 1st of April, it is clear that on that

(1) Law Rep. 8 Ch. 289.

date one instalment became due. No demand was made for the delivery of any iron, and none was delivered; but it is found by the case that up to that time the custom of the defendants in their dealings with the plaintiffs had been to deliver iron under such contracts without any further demand. On the 1st of April, therefore, one delivery became due from the defendants, and the plaintiffs became liable to accept and pay for the iron if delivered. Now it is clear upon the authorities that mere non-delivery of one or even two instalments of the iron, on the one side, and non-payment of the price of such instalment or instalments, on the other, would not per se amount to a rescission of the contract in the absence of any question of insolvency, or other evidence pointing towards rescission. Either party might afterwards have nevertheless insisted on fulfilment of the contract. But, in this case, insolvency supervened on the 12th of March. It is necessary, therefore, to consider what effect the insolvency and other circumstances connected with it had upon the contract in this case. It was not disputed that upon the occurrence of insolvency the vendor would not be bound to deliver to the insolvent purchaser an instalment of the iron becoming due without a tender of the price. Now, on the 1st of April the state of things was this: the plaintiffs had become insolvent; and one instalment of the iron being due, neither the plaintiffs nor any persons representing them had demanded or tendered payment for such instalment, nor had the defendants offered to deliver any iron, or asked for payment. That being the state of things, on the 5th of April the meeting of creditors took place, by which a resolution to accept a composition of 5*s.* in the pound was passed. At that meeting a statement, not of assets merely, but of affairs, was laid before the creditors, in which statement no mention whatever was made of this contract, nor any claim put forward in respect of it. The omission of all reference to it must moreover be taken to have been intentional, not through inadvertence or ignorance, for it is expressly stated in the case that the existence of the contract was mentioned at the meeting, and was known to those present at it. On the 1st of May, at which date three new partners joined the plaintiffs' firm, another instalment of the iron became due, if the contract were still in

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existence. There was not, however, any demand or claim in respect of it on either side. On the 13th of May, the plaintiffs claim the performance of the contract to its conclusion, tendering cash on receipt of invoice. It may be observed that the terms of their claim were not in accordance with what in any point of view they were entitled to, but their claiming too much could not deprive them of that to which they were really entitled.

The question that is raised for our consideration is, whether, on the 13th of May, there had been a rescission of the contract. Rescission must be by both parties; either both must have intended to rescind, or one must have so acted as to justify the other in thinking that he intended to rescind. It is clear that the omission to perform certain acts incumbent upon a party to a contract may justify the other party in coming to the conclusion that, in point of fact, the party guilty of the omission intends to abandon the contract, and is himself treating it as abandoned, and rescinding it.

Non-payment for one or two instalments of the iron would not be per se conduct justifying the conclusion on the vendor's part that the purchaser intended to abandon the contract. There might, however, be additional circumstances in connection with which such non-payment would be sufficient to justify such a conclusion on the vendor's part. Here the purchaser was insolvent. It would be, it appears to me, in accordance with what I have before said as to the law on this subject, the duty of the insolvent purchaser, if he meant to insist on the contract, to claim delivery of the instalments from time to time as they became due, and to offer cash in payment for them. This the plaintiffs did not do, and between the 31st of March and the 2nd of May, there is nothing to shew that they had any means of so doing. It is not until the 13th of May—three new partners having then come into the firm, and the contract having become very valuable by reason of the rise in the market—that the plaintiffs found themselves in a condition to offer cash, and then came forward to claim the benefit of the contract. In the meantime, they took no steps whatever to inform the defendants that they meant to stand by the contract; it was not included in the statement of affairs made to the creditors, and no claim whatever was made in respect of it. The circumstances of this case appear to me to come within the

authority of *Ex parte Chalmers.* (1) Here the plaintiffs did not take any of the steps suggested by Mellish, J., in his judgment (p. 294) in that case as proper to be taken if the contract is to be insisted on after the insolvency of the purchasers. To use the words of that learned judge, in summing up the result of the decision, they practically gave notice to their creditors and those with whom they had contracted that they did not mean to pay any of their debts or perform any of their contracts. So far as to the purchasers, but, assuming that they must be taken to have abandoned the contract, the question remains whether the vendors had also done so. On two dates, when in the ordinary course of things they would have delivered without demand, they make no delivery; they do nothing whatever, after the notice of insolvency, to shew that they intend to stand by the contract, and directly they are informed by the plaintiffs that they intend to hold them to the bargain, they write and say that it is at an end. To sum up, therefore, we have in this case the fact of insolvency, coupled with the fact that upon such insolvency the insolvents take none of the steps essential to indicate that they meant to stand by the contract. That is evidence from which it may fairly be found that the other party to the contract had a right to conclude that the insolvents had abandoned it, and, if they did so conclude, to abandon it themselves, and there is also amply sufficient evidence that the vendors did so abandon it. In coming to the conclusion at which we have arrived, I think we are well within the authorities on this subject. These are all discussed in the cases of *Freeth* v. *Burr* (2) and *Bloomer* v. *Bernstein* (3), the circumstances of which were analogous to those of the present case.

KEATING, J. I also am of opinion that our judgment should be for the defendants. In February, 1872, there was clearly a contract between these parties for the delivery of iron, which must have existed until put an end to by operation of law or by consent of the parties. Now, in my opinion, nothing occurred which by mere act and operation of law amounted to a dissolution

(1) Law Rep. 8 Ch. 289. (2) Law Rep. 9 C. B. 208.
(3) Law Rep. 9 C. P. 588.

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of this contract. Neither the insolvency of the purchasers nor any other of the circumstances of the case would have that effect. The only question, therefore, is whether the facts stated in the case shew that after the making of the contract the parties agreed to abandon it. It seems to me that they do. The assent of both parties is necessary to the rescission of the contract. First, then, as to the question whether the purchaser had abandoned the contract. Assuming that the first delivery of iron was not due until the 1st of April, we find that in the meanwhile, so early as the 14th of March, the plaintiffs discovered that they were in a state of insolvency, having been so, in fact, since the making of the contract, and communicated that state of things to the defendants. It is true that the plaintiffs were indebted at that time to the defendants on former transactions, and it was probably intended that the announcement of insolvency should refer to such debt, but in my opinion it was an announcement which the defendants had a right to consider as applicable to the state of all transactions between the parties in general. On the 5th of April a meeting of creditors took place, and in the meanwhile a person was appointed to manage the plaintiffs' affairs and collect the assets. Mr. Dowdeswell would have us lay no stress on the fact of this person's taking no steps with reference to this contract as a circumstance on which nothing turns, because his official position did not call on him to do so. I cannot assent to that view. It seems to me that it was his business generally to manage the affairs of the plaintiffs. Again, I cannot assent to the strictness with which Mr. Dowdeswell sought to confine the duty of the plaintiffs with respect to their statement to the creditors to making a mere statement of assets in a sense which would exclude this contract. If they considered this contract as a beneficial and valuable contract and intended to insist on it in future, they were bound, in my opinion, to introduce it into their statement of affairs. The fact of its existence would be a material element for the creditors to consider with reference to the amount of the composition to be paid. The fact of its not being introduced into the statement of affairs seems to me most material, and leaves no doubt on my mind that the plaintiffs did not at that time contemplate going on with the contract. Afterwards

new partners joined the firm, and the market having risen very considerably, and being likely still further to rise, the plaintiffs claimed delivery of the whole 200 tons. It seems to me that the evidence is amply sufficient to lead to the conclusion that the plaintiffs had intended to abandon the contract. Then, as it is not sufficient that the plaintiffs should have abandoned the contract, but the defendants must have assented to such abandonment, what is the evidence as to the defendants' conduct? I think there is also quite sufficient evidence of their intention to abandon the contract. Two deliveries were due: one on the 1st of April, another on the 1st of May, and the defendants having been informed of the plaintiffs' insolvency, did not deliver, and when the delivery was claimed on the 13th of May they immediately repudiated all further liability. I do not think that the proper construction of their letter is that they then for the first time repudiated the contract, but as an announcement of the fact that they had abandoned it at the time when they first knew that the plaintiffs could not perform it.

BRETT, J. The contract was for delivery of iron in monthly quantities, the first delivery being due on the 1st of April, according to the usage of trade, which, it was not disputed, was to be incorporated in the contract. The price of each delivery was to be paid in cash or by bill at four months. If there had been no insolvency, the defendants could not have resisted making a delivery in May on the ground that the plaintiffs had not insisted on any delivery in April, and would not have been ready to take delivery or pay the price of the iron if the defendants had insisted on delivering. That was decided in *Freeth* v. *Burr*. (1) Unless, therefore, the insolvency or some other circumstance has absolved the defendants from their liability to make deliveries after April, this action is maintainable. But after the making of the contract the plaintiffs were as a fact insolvent, and, moreover, they gave the defendants notice of the insolvency, which I take to be the governing fact in this case. If the contract had formed the purchaser's only outstanding liability, the effect of such a notice, without more, would have been, as it seems to me, to tell the

(1) Law Rep. 9 C. P. 208.

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vendor that he could not pay for the goods in accordance with the contract. In this case the plaintiffs petitioned the Court of Bankruptcy, and so gave notice to all their creditors that they were insolvent. Now, whatever may have been thought at one time on this subject, it appears to be the law that mere insolvency does not per se put an end to the contract. But the plaintiffs had become insolvent, and had informed the defendants of the fact. I think the effect of the judgment of Mellish, L.J., in the case of *Ex parte Chalmers* (2), is not that insolvency puts an end to the contract, or alters it, but that when one contracting party gives notice to the other that he is insolvent, and does nothing more, the other party has a right to assume that he intends to abandon the contract. The Lord Justice says, "If an insolvent has any such beneficial contracts, it is his duty to inform his creditors or the court of bankruptcy, if the case be within its jurisdiction, of the fact, and he can then apply to have a sufficient part of his assets applied for the completion of the contracts; and if the contracts were beneficial, this would no doubt be allowed by his creditors or by the Court. If this were done, and due notice were given to the creditor, I entertain no doubt he would be bound to complete the contract on his part, and would not be allowed to take advantage of the insolvency of the other party to put an end to the contract. But when the insolvent or his trustee does nothing of the kind, he practically gives notice to his creditors and to those with whom he has contracted that he does not mean to pay any of his debts or perform any of his contracts." The meaning of this seems to be that when the fact of insolvency is communicated to the vendor, a duty arises on the part of the insolvent to negative the presumption, that the vendor would be otherwise entitled to draw, that the insolvent intends to abandon the contract.

It will not, however, be sufficient to put an end to the contract, that the insolvent should intend to abandon it; the vendor must assent to its being put an end to. It is, as a matter of practice, most unlikely that the vendor would insist upon the contract continuing in force. In the case of a contract by which credit is to be given, as in this case, if the vendor, notwithstanding the pur-

(1) Law Rep. 8 Ch. 289.

chaser's insolvency, chooses to insist on the continuance of the contract, and on making deliveries under it, he must deliver, it appears to me, on the terms of the contract, i. e. on credit. If the purchaser insists on delivery, the vendor may refuse to deliver except on payment in cash. But if the vendor insists on delivery, the purchaser not wishing to go on with the contract, I take it the vendor can only insist on delivering in accordance with the contract, i. e. he must give credit to an insolvent party.

It is pretty certain, in such a case, that the vendor would abandon the contract after the declaration of insolvency. Very little evidence would therefore, I think, be sufficient from which to infer an abandonment of the contract by the vendor.

What, in this case, is the conduct of the parties upon the insolvency of the plaintiffs? A meeting of the creditors is called at a time when a delivery might have been demanded under the contract. If it had been thought that the contract was a beneficial contract, and one which it would be for the advantage of the estate to carry out, why, when the plaintiffs' affairs were being arranged, was not a delivery demanded on payment of the price? If it was intended to insist on the contract, it ought to have been put before the creditors, that they might consider whether, if it were carried out, a larger composition might not be ultimately obtainable. Nothing of the kind is done, and a statement of affairs is made which contains no allusion whatever to the contract. That, to my mind, is strong evidence that the plaintiffs had no idea of holding to the contract. After the meeting, neither the plaintiffs nor the receiver ever made any demand of delivery. The plaintiffs left the matter to rest entirely on the mere statement to the defendants that they were insolvent, and it was not until the 13th of May that they took any step whatever with respect to the contract. It seems to me that these facts point most strongly to the conclusion that the contract was abandoned by the plaintiffs, and that the demand of the 13th of May was a mere afterthought.

Abandonment by the plaintiffs would not, however, be sufficient by itself to rescind the contract. There must be some evidence of mutual rescission. It is necessary that the defendants should have

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made up their minds to rescind before the demand of the 13th of May was made upon them. They would have a right to rescind if the plaintiffs had rescinded, or if, the plaintiffs having so behaved themselves as to give them reasonable grounds to conclude that the plaintiffs had abandoned the contract, they did so conclude. I think the declaration of insolvency, unaccompanied by any subsequent intimation of any intention to enforce the contract, did give the defendants such reasonable grounds; and if they acted upon them, and themselves came to the conclusion to rescind the contract, it would be rescinded. As I before said, I think the smallest evidence would be sufficient of their having done so, and I think it is supplied by the fact that they did nothing to shew that they wished to go on with the contract, and broke from what is stated to have been their ordinary course of trade, viz. by not delivering as usual, without any demand for delivery.

It was argued by Mr. Dowdeswell that if on the 13th of May the defendants had sued the plaintiffs for non-acceptance of iron tendered to them under the contract, they would have had no defence. It appears to me that in that case precisely the same question as that which we have decided would have arisen, and in my opinion the conclusion would have been the same.

For these reasons I think our judgment should be for the defendants.

DENMAN, J., concurred.

Judgment for the defendants.

Attorneys for plaintiffs: *Day & Hassard.*
Attorneys for defendants: *Helder & Roberts.*

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Nov. 4.

Estoppel—Judgment of an Inferior Court of Competent Jurisdiction—County Court—Costs—Certificate under 30 & 31 *Vict. c.* 142, *s.* 5, *not affected by the Provision in* 19 & 20 *Vict. c.* 108, *s.* 39.

A. occupied a cottage under B.; who, on the 14th of March, 1873, proceeded against him before magistrates, under statute 1 & 2 Vict. c. 74, for not quitting on a week's notice, and obtained a warrant or order for his eviction, and turned out him, his family, and furniture on the 21st of April.

B. then sued A. in the Reading county court for 29*s.* alleged to be due for twenty-nine weeks' "rent of a cottage," at 1*s.* per week; and in support of his claim he put in an agreement signed by his agent, and purporting to be "marked" by A. A. swore that his tenancy was a yearly and not a weekly tenancy, that the agreement produced was fraudulent, and that the mark purporting to be his was not put thereto by him or by his authority. The judge gave judgment for A.,—affirming the tenancy to be *yearly*.

In August, 1873, A. took out a summons in the county court against B., to recover damages for the eviction, and for injury to his goods. The proceedings on the summons were stayed by B., by giving a notice and making a deposit with the registrar of the court, under 19 & 20 Vict. c. 108, s. 39.

A. then brought his action in this Court. The pleadings raised the question of fact whether the tenancy was a yearly or a weekly tenancy; and there was also a replication setting up the judgment of the county court by way of estoppel; and at the trial the jury found, upon the evidence before them, that the tenancy was *weekly*. The judge, however, ruled that the judgment of the county court (on proof that the matter tried in that court was the same as that in issue in this Court) was a conclusive estoppel against the defendant; and thereupon he directed a verdict to be entered for the plaintiff (the damages being assessed by the jury at 5*l.*), reserving leave to the defendant to move to enter a verdict for him, if the Court should be of opinion that he was not concluded by the trial and judgment in the county court:—

Held,—upon the argument of the rule and of a demurrer to a rejoinder of nul tiel record,—that the judgment of the county court, being a court of competent jurisdiction, was conclusive as an estoppel.

At the trial the judge declined to certify, under 30 & 31 Vict. c. 142, s. 5, that "there was sufficient reason for bringing the action in the superior Court:"—

Held, that he was justified in so doing, notwithstanding that the plaintiff was prevented from suing in the county court by the defendant's availing himself of 19 & 20 Vict. c. 108, s. 39:

Held, also, that that provision does not affect the discretion of the judge as to certifying under 30 & 31 Vict. c. 142, s. 5.

THIS was an action for breaking and entering the dwelling-house and premises of the plaintiff, situate at Wakefield, in the parish of

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Stratford Mortimer, in the county of Berks, and seizing and carrying away the plaintiff's furniture and effects, &c., and evicting the plaintiff and his wife and children. Claim, 100*l.*

Pleas: 1. Not guilty; 2. Leave and licence; 3. That the dwelling-house and premises were not the plaintiff's, as alleged; 4. That the goods were not the plaintiff's goods, as alleged; 5. That the dwelling-house and premises in the declaration mentioned was the dwelling-house and freehold of the defendant, wherefore the defendant broke and entered, &c., and removed the plaintiff and his family, &c.

Sixth plea: That, before the committing of the trespasses alleged in the declaration, and from thence until and at the time of the giving of the notice to quit thereinafter mentioned, the plaintiff held the dwelling-house and premises as tenant thereof to the defendant from week to week, at a certain rent less than 20*l.* a year, to wit, 1*s.* a week, and upon which no fine was reserved or made payable, the tenancy being determinable by either party by a week's notice; that the defendant gave the plaintiff a week's notice to quit; that the plaintiff refused to go out, whereupon the defendant took proceedings under statute 1 & 2 Vict. c. 74, and on the 21st of April, 1873, under a warrant of two magistrates of the division, caused the plaintiff to be evicted from the premises, and his goods to be put out; and that the trespasses in the declaration mentioned were the entries, expulsion, ejection, and removal of the plaintiff and his family and goods in pursuance of the said warrant as thereinbefore stated, and not otherwise.

The plaintiff joined and took issue upon the pleas respectively.

2. For a further replication to the fifth plea,—that long before the said time when &c., and whilst the defendant was so possessed of the dwelling-house and premises in which &c., he, the defendant, demised the dwelling-house and premises in which &c. to the plaintiff for a certain term at a certain rent, and the plaintiff accepted the said demise, and under and by virtue thereof entered into the said dwelling-house and premises in which &c., and became and was possessed thereof, and continued so possessed thereof until the defendant afterwards, and during the continuance of the said demise, to wit, at the said time when &c., of his own wrong broke into and entered the said dwelling-house and pre-

mises, and committed the trespasses in manner and form as in the declaration complained of.

3. Third replication to the third plea,—that the defendant ought not to be permitted to plead the said plea, because the plaintiff said that, after the said time when &c., and before the commencement of this suit, the now defendant brought his suit by plaint in due form of law in the county court of Berkshire, holden at Reading, then being a county court duly constituted and holden under the statutes relating to county courts, and then having full jurisdiction to receive the said plaint and to hear and determine the matters therein complained of, and thereinafter in that plea mentioned, against the now plaintiff, then dwelling and residing within the jurisdiction of the said county court, to recover from the now plaintiff the sum of 1*l.* 9*s.*, for rent alleged to be due from the now plaintiff to the now defendant for the said dwelling-house and premises in which &c., situate within the jurisdiction of the said county court, from the 27th of September, 1872, to the 21st of April, 1873, being twenty-nine weeks, at 1*s.* per week; and all lawful proceedings were thereupon had and taken, and the said plaint came on to be and was duly tried in the said county court before the judge thereof, then having full jurisdiction to try the same; and upon such trial the question to be tried and determined became and was whether the now plaintiff had been and was a tenant of the now defendant of the said dwelling-house and premises in which &c. from week to week during the said period of twenty-nine weeks and up to the said period when &c., to wit, the said 21st of April, 1873, or any part thereof, and therefore indebted to the now defendant, or whether during and at such times as last aforesaid the plaintiff was such tenant for a longer term than from week to week, to wit, from year to year, and which last-mentioned tenancy had not ended or been determined except by the trespasses in the declaration mentioned, and therefore the now plaintiff would not be indebted to the now defendant; and thereupon, after hearing the evidence of the witnesses produced by the respective parties on oath, it was adjudged and determined by the said judge of the said county court that the now plaintiff had not been and was not tenant to the now defendant from week to week of the said dwelling-house and premises in which &c. during

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and at the times aforesaid, or any part or parts thereof, and that the now plaintiff had been and was at the aforesaid time such tenant for a longer time than from week to week, to wit, from year to year, and that the said sum of 29*s.* was not nor was any part thereof due from the now plaintiff to the now defendant as claimed in and by the said plaint; and thereupon the said judge of the said county court gave judgment for the now plaintiff upon the said plaint, and that the now defendant take nothing by his said plaint; and the said judgment for the now plaintiff was thereupon and before this suit duly entered of record in the proper book of the said county court, according to law; and the said judgment still remains in force and unreversed; verification and prayer of judgment if the now defendant ought to be admitted, against the said judgment of the said county court, to plead the plea therein pleaded to.

4, 5. The fourth and fifth were similar replications to the fifth and sixth pleas respectively.

6. Sixth replication to the sixth plea,—that the defendant had not, at the time of granting the warrant in the plea alleged, lawful right to the possession of the said premises according to the true intent and meaning of the statute in the sixth plea referred to.

Rejoinders,—1. The defendant took and joined issue upon all the replications.

2. As to the second replication to the fifth plea, the defendant rejoined that, although the dwelling-house and premises had been demised by the defendant to the plaintiff as in the replication mentioned, yet that at the time when &c. the said demise had been determined by due notice before then given to the plaintiff.

3. As to so much of the third, fourth, and fifth replications to the third, fifth, and sixth pleas as averred the adjudication and determination by the judge of the county court of certain alleged material questions and matters in the said replications mentioned, and the entry of record of the said judgment, the defendant said that there is not any record of the said supposed adjudication, and adjudgment of the said questions and matters remaining in the said court.

Demurrer to the third, fourth, and fifth replications to the

third, fifth, and sixth pleas, on the ground "that the said replications and each of them are and is consistent with the pleas which traverse the plaintiff's possession, and that the said replications do not shew a matter of estoppel by record.

Surrejoinder, joining issue upon the second and third rejoinders, and joinder in demurrer.

The cause was tried before Lord Coleridge, C.J., at the last spring assizes for Berks. The plaintiff, an agricultural labourer, occupied a cottage under the defendant at Chatfield Mortimer, in the county of Berks, whence he was evicted on the 21st of April, 1873, by virtue of a warrant issued by two justices under the statute 1 & 2 Vict. c. 74, as stated in the sixth plea.

The contention on the part of the plaintiff was, that he had held the cottage from which he alleged that he had been unlawfully evicted, as tenant from year to year at a rent of 2*l.* 12*s.*, payable yearly. On the part of the defendant it was asserted that the tenancy was from week to week, at a rent of 1*s.* per week, and that, the plaintiff refusing to go out on a proper notice, he was lawfully evicted.

A plaint had been brought in the county court at Reading by the now defendant against the now plaintiff to recover 29*s.* for twenty-nine weeks' rent at 1*s.* per week, from the 27th of September, 1872, to the 21st of April, 1873. This plaint was heard before the judge of the county court on the 21st of May, 1873, when the now defendant relied upon an agreement alleged to have been signed by the agent of the now defendant and with the mark of the now plaintiff, in which agreement the tenancy was described as a tenancy at 1*s.* per week, determinable by either party on one week's notice. The now plaintiff denied having put his mark to the alleged agreement; and, after hearing the evidence, the judge gave judgment for the now plaintiff,—thus affirming the tenancy to be a yearly and not a weekly tenancy; and at the request of the now plaintiff's attorney the judge impounded the agreement.

On the 5th of August, 1873, the now plaintiff took out a summons in the county court at Reading against the now defendant, to recover damages for the eviction and the injury to his furniture. This summons was returnable on the 29th of August;

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but, on the 20th of August, the now defendant gave notice to the registrar, under 19 & 20 Vict. c. 108, s. 39 (1), that he objected to the cause being tried in the county court, and proposing to deposit a sum of money in lieu of sureties. A sum of 150*l.* was accordingly deposited by the now defendant, and the proceedings in the county court were put an end to.

This action was then brought on the 7th of November, 1873. At the trial, five several receipts were put in by the plaintiff, for 2*l.* 12*s.* each, for rent purporting to be due for a year's occupation from Michaelmas to Michaelmas respectively. Certified copies of the entry of the plaint (for rent) and of the judgment of the county court, under the seal of the court, were also put in; and the judgment was relied upon as a conclusive estoppel against the now defendant setting up a weekly tenancy.

All that appeared on the face of the record in the county court was, that the claim of the then plaintiff (the now defendant) was for 1*l.* 9*s.* for "rent of cottage," and that the judgment was given for the then defendant.

The jury on the trial, upon the evidence given before them, found that the tenancy was a weekly and not a yearly tenancy; but the Lord Chief Justice, being of opinion that, on proof of the question at issue in the county court, the matter was res judicata and concluded by that judgment, directed a verdict to be entered for the plaintiff (the damages being assessed by the jury at 5*l.*), and reserved leave to the defendant to move to enter a verdict for him, if the Court should be of opinion that he was not concluded by the trial and judgment in the county court; and he declined to certify for costs.

A rule nisi having been obtained, the rule and the demurrers (June 18, 1874,) came on for argument.

Bosanquet and *Mirehouse* shewed cause. The demurrer raises

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(1) 19 & 20 Vict. c. 108, s. 39: "If in any action of contract, the plaintiff shall claim a sum exceeding 20*l.*, or if in any action of tort the plaintiff shall claim a sum exceeding 5*l.*, and the defendant shall give notice that he objects to the action being tried in the county court, and shall give security, to be approved of by the registrar, for the amount claimed, and the costs of trial in one of the superior Courts of common law, not exceeding in the whole the sum of 150*l.*, all proceedings in the county court in any such action shall be stayed."

the same question as that raised by the rule, viz. whether the decision of the county court was final and conclusive between the parties that the tenancy was yearly and that the eviction took place before any rent was due. The rule upon this subject is well laid down in Best on Evidence, 5th ed. p. 732: "'Res judicata,' says the Digest (1), 'dicitur, quæ finem controversiarum pronunciatione judicis accipit; quod vel condemnatione vel absolutione contingit.' But, in order to have the effect of res judicata, the decision must be that of a Court of competent jurisdiction, concurrent or exclusive,—'Judicium a non suo judice datum, nullius est momenti.' (2) The decisions of such tribunals are *conclusive* until reversed; but no decision is *final* unless it be pronounced by a tribunal from which there lies no appeal, or unless the parties have acquiesced in the decision, or the time limited by law for appealing has elapsed. (3) Moreover, the conclusive effect is confined to the point actually decided, and does not extend to any matter which collaterally came in question. (4) It does, however, extend to any matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point in issue:" *Reg.* v. *Hartington.* (5) See the judgment of Coleridge, J., in the last-cited case. The judgment of the county court, as explained by the evidence (which was clearly admissible), proves all that is alleged in the third replication. In *Routledge* v. *Hislop* (6), which is exactly in point, a servant in husbandry having been hired to serve from the 1st of April, 1858, to Martinmas next ensuing, for the wages of 5*l.*, entered the service, and continued in it till the 17th of November, when her master discharged her. Thereupon she sued him in the county court, claiming damages for the discharge, as having been made without reasonable cause. The judge of the county court gave a verdict for the master, the defendant in the suit. Afterwards, in

(1) Dig. lib. 42, tit. 1, l. 1.

(2) 10 Co. 76. b.

(3) 1 Ev. Poth. part. 4, ch. 3, sect. 3, art. 1.

(4) Per De Grey, C.J., delivering the opinion of the judges to the House of Lords in *The Duchess of Kingston's Case*, 11 St. Tr. 198; 1 Roll. Abr. 876; *Blackham's Case*, 1 Salk. 290; *Rex* v. *Knaptofft*, 2 B. & C. 883; *Carter* v. *James*, 13 M. & W. 137.

(5) 4 E. & B. 780; 24 L. J. (M.C.) 98.

(6) 2 E. & E. 549; 29 L. J. (M.C.) 90.

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May, 1859, the servant took out a summons before justices against the master, to recover the 5*l.* wages: and it was held, on appeal to the Queen's Bench, that, the question for decision in the county court and by the justices being substantially the same, viz. whether the discharge of the servant was without just cause, the justices were bound to treat the decision of the county court,—a court of concurrent jurisdiction,—upon it as conclusive between the parties, although the form of claim in the summons varied from that made in the county court. The case of *Williams* v. *Lord Bagot* (1) was referred to in argument. But Cockburn, C.J., delivering the judgment of the Court, said (2): "The question for our determination is, whether the decision of the justices (3) was correct in point of law. We are of opinion that it was not. The matter for their consideration was, in truth, the same identical matter which had been decided by the judge of the county court, viz. whether the discharge of the respondent by the appellant was wrongful and without just cause. The judge of the county court had jurisdiction to hear and determine that question, and, after he had given his judgment thereon, it was not allowable to the respondent, by resorting to a different tribunal, to re-open the question and have it tried a second time. The rule of law is plainly stated by De Grey, C.J., in delivering the opinion of the judges in the House of Lords in the *Duchess of Kingston's Case* (4), viz. that the 'judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the same parties upon the same matter directly in question in another Court.' Applying that rule to the present case, it was open to the justices to inquire whether the county court had jurisdiction, and whether the judge of that court had decided that the discharge of the respondent was rightful and not without due cause: but, as soon as they had ascertained both these facts in the affirmative, they were bound by law not to allow the dispute as to the discharge being wrongful to be re-opened, and to treat the decision of the county court as conclusive between the parties." Where matters have been referred to arbitration, it is matter of evidence whether a

(1) 3 B. & C. 772.
(2) 2 E. & E. at p. 555. JmMS 199.
(3) In favour of the claim of the servant.
(4) 11 St. Tr. 198; 2 Sm. L. C. p. 679, 6th ed.

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particular subject of complaint has been submitted to the arbitrator's consideration: *Martin* v. *Thornton.* (1)

[GROVE, J. The record in ejectment does not shew the matters that were in issue. That is the reason why ejectment is the exception.]

The plaintiff is entitled to the mesne profits on production of the judgment in ejectment: the judgment is conclusive between the parties that the plaintiff is entitled to possession at the time. If the sentence of an Ecclesiastical Court in a suit for administration turns upon the question of which of the parties is next of kin to the intestate, such sentence is conclusive upon that question in a subsequent suit in Chancery between the same parties for distribution: *Barrs* v. *Jackson.* (2) Vice-Chancellor Knight Bruce in giving judgment in that case (3) quotes the language of Lord Hale in *Blackham's Case* (4) and of Lord Chief Justice De Grey in the *Duchess of Kingston's Case.* (5)

[BRETT, J. On a plea of autrefois convict or autrefois acquit, when the record is produced, you always shew what was the matter tried.]

H. D. Greene and *Darling*, contrà. As to the rejoinder of nul tiel record, there is no record of the county court which proves by *itself* that the matter in issue in that court was the same as that which is in controversy between the parties in this action. All that that record shews is, that, on the 1st of May, 1873, the then defendant, Flitters, did not owe the then plaintiff, Allfrey, 29*s.* for rent of a cottage. The county court is a court of record. Sect. 111 of 9 & 10 Vict. c. 95, provides that "minutes" are to be taken by the registrar of all judgments, &c., and that these, sealed, signed, and certified, shall be admitted as evidence thereof. These alone would be admissible to shew the subject-matter and the grounds of the decision. (6) In *Kemp* v. *Neville* (7), which was an action against the Vice-Chancellor of the University of Cambridge for false imprisonment, Erle, C.J., in the course of his judgment, says: "One important practical consequence resulting from the Vice-Chancellor

(1) 4 Esp. 180.
(2) 1 Ph. 582.
(3) 1 Y. & C. C. C. 585; at pp. 594, 595.
(4) 1 Salk. 290.
(5) 11 St. Tr. 261.
(6) See *Dews* v. *Ryley*, 2 L. M. & P. 544.
(7) 10 C. B. (N.S.) 523, 547; 31 L. J. (C.P.) 158.

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being considered as a judge of a court of record is this, that the proceedings before him can be proved or disproved by the record thereof only." In *Sintzenick* v. *Lucas* (1), Lord Kenyon says, that, "in order to make a record evidence to conclude any matter, it should appear that that matter was in issue, which should appear from the record itself; nor should evidence be admitted that under such a record any particular matter came in question."

[GROVE, J. Suppose three or more defences are set up, and the county court judge gives judgment for the plaintiff without assigning any reasons, would the mere production of the record conclusively shew that all the matters raised before the judge were decided against the defendant?]

In *Green* v. *Alston* (2) oral evidence as to what had taken place on the occasion of an issue being directed by the Court of Chancery was held not to be admissible to explain it, the minutes of the decree or order directing the issue being alone the proper evidence of it.

[BRETT, J. What was wanted to be got at there was, what was the decision. The minutes were the only evidence of that.]

What the Court is asked by the replication in this case to say is, that the question now raised arose before the county court judge, without any proper evidence.

The replication to the special (sixth) plea, which sets up a justification under 1 & 2 Vict. c. 74, is bad in substance. It alleges an estoppel, but does not shew it to be matter of record, nor does it shew that the judgment of the county court judge was upon the same matter. In the notes to *The Duchess of Kingston's Case*, in 2 Sm. L. C. 6th ed. 694, it is said that "a record imports such absolute verity that no person against whom it is producible shall be permitted to aver against it." And 1 Inst. 260 is referred to, where Lord Coke says: "The rolls, being the records or memorials of the judgments of the Courts of record, import in them such uncontrollable credit and verity as they admit of no averment, plea, or proof to the contrary. And if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself; and the reason hereof is apparent, for, otherwise (as our old authors say, and that truly,) there should

(1) 1 Esp. 43. (2) 1 F. & F. 12.

never be any end of controversies, which would be inconvenient." The Lord Chief Justice was clearly wrong in his view as to the conclusiveness of the record in this case. Evidence ought not to have been admitted to support the judgment of the county court.

In Taylor on Evidence, 6th ed. vol. ii., p. 1451, it is said: "In order that a judgment should bind parties and privies, it must have *directly decided the point* which is in issue in the second suit; and therefore, whenever it is pleaded by way of estoppel, or is offered in evidence, the opposite party is always at liberty to deny on the record, or at the trial, that it has settled the rights of the parties as to the same cause of action which is now in controversy; and the question of identity thus raised must be determined by the jury upon the evidence adduced. The due determination of this question will require a careful examination of the issues raised in the two actions; for, while, on the one hand, it is not necessary that the actions should be in the same *form*, provided the facts in issue are really the same; so, on the other, it is not sufficient that the *writs* should be *identical*, if the issues raised by the pleadings are different."

THE COURT suggested a compromise; but neither party seemed disposed to assent to it.

Cur. adv. vult.

Nov. 4. The judgment of the Court (Brett and Grove, JJ.) was delivered by

GROVE, J. This was an action for breaking and entering the house and premises of the plaintiff. The pleas, so far as they were material to the point to be decided, were, that the house and premises were not the plaintiff's; that they were the defendant's; and a special plea setting up that the plaintiff was a weekly tenant to the defendant, which tenancy was determined by notice to quit, that the plaintiff refused to quit and deliver up possession, and that the defendant, by virtue of stat. 1 & 2 Vict. c. 74, took possession under warrant of magistrates.

To these three pleas there were three replications in the same form, averring that the now defendant brought his plaint in a county court for rent on a weekly tenancy, that the question then to be determined was whether the now plaintiff was a weekly or a

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yearly tenant, which yearly tenancy had not ended or been determined except by the trespasses in the declaration mentioned, &c., that it was adjudged by the judge of the said court that the now plaintiff was not tenant from week to week, but from year to year, and that the rent claimed was not due, and that the said judge gave judgment for the defendant, which judgment was entered of record and remains in force.

To these replications the now defendant rejoined respectively nul tiel record, and demurred.

The case came on to be tried before the Lord Chief Justice at the last spring assizes for the county of Berks, when the facts alleged in the replications were proved to have been tried as questions of fact before the county court judge; and the judgment was put in. On the face of that judgment, it only appears that the claim was for 1*l.* 9*s.* for rent of a cottage, and that the judgment was for the defendant.

The jury in the present case, upon the evidence before them, found a weekly tenancy, for the now defendant; but the Lord Chief Justice, being of opinion that, on proof of the matters tried in the county court, and of the judgment, the matter was res judicata, and concluded by the judgment in the county court, entered the verdict for the plaintiff, with 5*l.* damages (assessed by the jury); giving the defendant leave to enter the verdict for him, if the Court should be of opinion that he was not concluded by the trial and judgment in the county court.

A rule was granted, and the case was argued before us at the sittings in banc after last term.

The main contention of Mr. Greene in support of the rule was, that the judgment of the county court only shewing on the face of it that the then defendant did not owe the then plaintiff 1*l.* 9*s.*, was not an estoppel, and that he was entitled to maintain the verdict given by the present jury upon the three issues as to possession or right of possession of the tenement,—several cases being cited in support of this contention,—and that he was entitled to judgment on the rejoinders of nul tiel record.

We are of opinion that the entry of the verdict by the Lord Chief Justice was right, and that the plaintiff in the present action is entitled to judgment.

It seems to us unnecessary to decide whether the judgment was

an estoppel, and could be pleaded as such; but we think that the facts stated in the replications and the judgment which were proved, were, in the words of De Grey, C.J., in the *Duchess of Kingston's Case* (1), "as evidence conclusive between the same parties upon the same matter directly in question in another Court."

The case of *Routledge* v. *Hislop* (2) is in point. There, a servant who had been hired for a quarter was discharged before the end of the quarter, and sued her master for discharging her without reasonable cause; and a verdict was given for the defendant. After the quarter had elapsed, she took out a summons before justices against the defendant to recover the quarter's wages. It was held by the Court of Queen's Bench that, though the form of the claim was different, yet that the matter for consideration was the same, and that the magistrates were bound by law to treat the decision of the county court as conclusive between the parties; and judgment was given accordingly. So, in *Buckland* v. *Johnson* (3), which was an action for money had and received, to which the defendant pleaded that the money was the proceeds of the sale of goods the value of which had been recovered by the plaintiff in an action of trover against another jointly liable with him. To this plea, nul tiel record was replied. It was held by this Court that this plea, being proved, was an answer to the action, even though a larger sum of money was obtained by the sale of the goods than was recovered by the plaintiff in the action of trover, and though this action had been brought, not against the defendant, but against a person with whom he was jointly liable. The question was, whether the same evidence would support both actions; and, this being so, the defendant obtained judgment.

Some objection was taken in the present case to the form of the plea; but, as this would, if taken at the trial, have been amended (as, indeed, was said by Jervis, C.J., to an objection of the same sort in the case we have just cited), and would have been amended on the argument on the demurrer, if that had been argued before the trial, and as the real question reserved for us is whether the replications are, when proved, a substantial answer to the pleas to

(1) 11 St. Tr. 9; 2 Sm. L. C. p. 679, 6th ed.

(2) 2 E. & E. 549; 29 L. J. (M.C.) 90.

(3) 15 C. B. (N.S.) 145; 23 L. J. (C.P.) 204.

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which they are replied, we should not make this rule absolute upon any mere matter of form.

It was contended in the present case, that, as the judgment was for the defendant, it amounted to no more than that he did not owe 1*l.* 9*s.* for rent, and this might be in the nature of a nonsuit, and not bar the plaintiff in a subsequent action; but the County Court Act, 9 & 10 Vict. c. 95, seems to provide for this difficulty, as it enacts, in s. 89, "that every order and judgment of any court holden under this Act, except as herein provided, shall be final and conclusive between the parties; but the judge shall have power to nonsuit the plaintiff in any case in which satisfactory proof shall not be given to him entitling either the plaintiff or defendant to the judgment of the Court." Here, final judgment was entered for the defendant, and it would in our judgment be against principle and authority, if a party having tried an experiment in a county court, could, when judgment was against him, proceed again in another court, not by way of appeal, but by merely varying the form of procedure, or forcing the opposite party to proceed for redress in respect of the same question as had been previously litigated, again harass his antagonist for the same cause, and take his chance of success in another Court, when he has previously failed in a Court of competent jurisdiction.

We therefore hold that the verdict was rightly entered for the plaintiff, that the replications are good in substance, and are proved, and that this rule must be discharged.

Judgment for the plaintiff. Rule discharged.

Nov. 24. *J. O. Griffits* moved for a rule to shew cause why the plaintiff should not be allowed his costs, under 30 & 31 Vict. c. 142, s. 5 (1), notwithstanding the refusal of the Lord Chief

(1) 30 & 31 Vict. c. 142, s. 5: "If in any action commenced after the passing of this Act in any of Her Majesty's superior Courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in the superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

Justice to certify under that section that there was sufficient reason for bringing the action in the superior Court. This action, —or, rather, an action for the same cause,—was originally brought in the county court of Reading, but was frustrated by the act of the defendant, who, under the power given him by s. 39 of 19 & 20 Vict. c. 108 (1), stayed the proceedings in the inferior court, and compelled the plaintiff to resort to the superior Court for redress. The state of the pleadings, and the course of the argument upon the demurrer and on the motion to enter a verdict for the defendant, besides the fact of the Court having taken time to consider its judgment, sufficiently evidence the importance of the questions at issue.

[LORD COLERIDGE, C.J. The now plaintiff succeeded upon the trial of a plaint in the county court which involved the same question of fact as that which was in issue in this cause, viz. whether his tenancy under the defendant was a weekly or a yearly tenancy. The defendant thought the decision of the county court wrong. Upon the trial of this cause, the jury thought so too; and I agreed with them: but the plaintiff, against the right, succeeded upon an estoppel. I was asked to certify for costs. In the exercise of my discretion, I refused to do so. You now apply for a rule to enable the plaintiff to get all the costs of an action which in my judgment ought never to have been brought.]

The judgment of this Court established the right of the plaintiff to maintain this action. Having a conclusive judgment in his favour upon the facts, he had a perfect right to bring his action for the purpose of recovering damages for the wrongful eviction. The bringing it in this Court was not his act, but the act of the defendant himself, who chose to take advantage of a power given him by the statute to prevent the question from being tried before the less expensive tribunal. The opinion expressed by the jury was arrived at by the appearance upon the record of issues which the result has shewn to have been irrelevant.

[DENMAN, J. The recent statute vests a discretion in the presiding judge to grant or to withhold his certificate. Here, my Lord in the exercise of that discretion refused to certify, because he thought the plaintiff had brought an unrighteous action.]

(1) Ante, p. 34, n. (1).

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The discretion of the judge in this respect is always subject to review by the Court. This, however, is not an appeal from his Lordship's decision, but a substantive application to the Court for an order for costs, regard being had not only to what passed at the trial but also to what has taken place since.

[DENMAN, J. Substantially it is an appeal from the judge: and it must be a very strong case to induce us to interfere.]

The statutory provision which enables a defendant virtually to remove a case from the county court requires him to give security for costs. Having given the security, he ought to pay the costs.

[KEATING, J. If the legislature had intended that the defendant should under such circumstances pay costs at all events, they would have said so in distinct terms. Your argument would go to render nugatory the discretion vested in the judge by 30 & 31 Vict. c. 142, s. 5.]

That provision was intended to apply only to cases where the plaintiff exercises an option in commencing an action in the superior court, without sufficient reason for doing so, and fails to recover a sum that will justify his proceeding. Here, the plaintiff's legal right has been established by a solemn judgment of the Court.

[BRETT, J. That is to say, the plaintiff has got 5*l.* according to law, which in justice he ought not to have got: and he now wants the costs of getting it.]

KEATING, J. I have felt much struck by the forcible way in which Mr. Griffits has put his case. The plaintiff, he says, had a clear legal right to some damages; and, as he was compelled by the act of the defendant to resort to a superior Court to recover them, the defendant ought to pay the difference in the costs of the proceeding. I was also struck by the observation that the opinion expressed by the jury was arrived at by the appearance upon the record of issues which were not strictly relevant. Those issues, however, were there; and the jury, upon the evidence before them, found that the plaintiff never ought to have brought this action,—that he was from the first entirely in the wrong. That appearing before my Lord, the question arose as to how he

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was to exercise his discretion under the statute. Having heard all the facts, I have come to the conclusion, not only that I cannot see that my Lord was wrong in declining to certify that there was sufficient reason for bringing the action in the superior Court, but that I should have exercised my discretion in the same way that he did. I therefore think there should be no rule.

BRETT, J. This is an action brought by a writ issued out of this Court. The record presented issues of fact as well as issues of law. At the trial one fact only was in dispute between the parties, viz. whether the plaintiff's tenancy under the defendant was a weekly or a yearly tenancy. By the issues in law the plaintiff insisted that that question could not be inquired into, because it had already been decided by a court of competent jurisdiction, viz. the county court. The issues of fact were tried; and these the jury found against the plaintiff. But the Lord Chief Justice ruled, and this Court agreed with him, that, although the truth and justice of the case were with the defendant, he was estopped by the decision of the county court from availing himself of them. It must be taken on the finding of the jury, and the approval of that finding by the judge, that, if the truth could have been tried, the defendant must have succeeded. By reason of the estoppel, however, the plaintiff was held to be entitled to a verdict, and the jury assessed the damages at 5*l*. Now, the legislature has enacted that, although the plaintiff in an action of tort recovers a verdict for 5*l*., the judge is to determine whether or not he is entitled to have his costs paid by the defendant. That question rests upon the discretion of the judge. Here, the judge, upon a full consideration of all the circumstances, came to the conclusion that the action ought not to have been brought at all. True, the plaintiff had by some means obtained a decision in his favour in the county court. But the Lord Chief Justice was of opinion that he ought not to have recovered. In other words, he came to the conclusion that the plaintiff obtained the verdict in the county court by means of perjured evidence,—by evidence which he knew to be perjured. Under these circumstances, I think my Lord was quite right in declining to certify that there was sufficient reason for bringing the action in the superior Court. But Mr. Griffits

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says that this case is taken out of the statute of 30 & 31 Vict. c. 142, because an action had originally been brought in the county court to recover the damages sought to be recovered here, which action was stopped by the exercise by the defendant of the right given him by the 39th section of 19 & 20 Vict. c. 108; and therefore the plaintiff was compelled to have recourse to a superior Court. I am, however, of opinion that there is no colour for saying that that is any ground for holding that the provision in the 30 & 31 Vict. c. 142 is not to have effect. I think my Lord was quite right in withholding his certificate, and that there should be no rule.

DENMAN, J. In this action of tort the plaintiff recovered a verdict for 5*l.*, and the judge who tried the cause refused to certify under 30 & 31 Vict. c. 142, s. 5, on the ground that, in his judgment, the action was an unrighteous one and ought never to have been brought at all. I see no reason to doubt that in so doing he came to a proper conclusion. It has been urged that the certificate should have been granted here, because the defendant, in the exercise of his right under 19 & 20 Vict. c. 108, had put an end to the plaintiff's proceeding in the county court for the recovery of the damages which were the subject of this action. I think, however, that restriction cannot be put upon the exercise of discretion by the judge under this statute. And I see no reason for doubting that the discretion was well exercised here.

LORD COLERIDGE, C.J. I am at all times willing that my discretion should be reviewed. But I must confess I do not see the slightest ground for saying that I exercised it wrongly here. What influenced me was this,—An action had been brought against him in the county court, in which it was necessary for the now plaintiff to prove that he held a certain cottage as a yearly tenant. A document was there put in by the now defendant to shew that it was a weekly tenancy. The now plaintiff swore that that document was fraudulent, and that his mark thereto was a forgery. It is not for me to say upon what ground the judge of the county court thought fit to adopt that view, and to hold against the document, that the now plaintiff held as a yearly and not as a weekly

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tenant. Having thus succeeded in the county court, the plaintiff proceeded to bring this action to recover damages from the defendant for turning him out. If it was a weekly tenancy, he had had a proper notice to quit. If, on the other hand, it was a yearly tenancy, he had been improperly turned out. The matter was very fully gone into before the jury, who found that the tenancy was a weekly one. But, inasmuch as there was a replication upon the record setting up the judgment of the county court as an estoppel, I felt compelled to rule that the matter was concluded by the judgment in the county court. I think the jury, upon the evidence before them, could have come to no other conclusion than that the judgment in the county court was obtained by means of perjury, and that this action was brought to enforce a judgment so obtained. When, therefore, I was asked to certify for costs against a defendant whom the jury believed and I believed to have been substantially and morally in the right, I declined to do so. If I am right in my view of the facts, I cannot understand how I could have acted otherwise.

Rule refused.

Attorneys for plaintiff: *Lovell, Son, & Pitfield, for C. Henderson, Reading.*

Attorneys for defendant: *Rickards & Walker, for ~~Collins~~, ~~Reading~~ Cave Thackeray*

VAUGHAN *v.* WELDON.

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Nov. 20.

Practice—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76) *s.* 18—*Writ for Service out of the Jurisdiction—Cause of Action.*

It is sufficient to entitle a plaintiff to proceed under the Common Law Procedure Act, 1852, s. 18, that the breach of contract should have arisen within the jurisdiction.

THIS was an application to set aside the writ, service of the writ, and subsequent proceedings in an action brought upon a contract made out of the jurisdiction in respect of a breach of such contract within the jurisdiction. The question was, whether the plaintiff was entitled to proceed under the Common Law Procedure Act, 1852, s. 18, and the matter had been referred by

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Denman, J., from Chambers to the Court, there having been a conflict of decisions among the courts on the question whether such a case was within the Common Law Procedure Act, 1852, s. 18: the Queen's Bench holding in the case of *Allhusen* v. *Malgarejo* (1) that to bring a case within that section, both the contract and the breach must have been within the jurisdiction; the Common Pleas holding in *Jackson* v. *Spittal* (2), that it was enough if the breach arose within the jurisdiction; and the Court of Exchequer, in *Durham* v. *Spence* (3), being equally divided in opinion on the subject.

A. L. Smith, shewed cause against the application.
Thesiger, Q.C., supported it.

LORD COLERIDGE, C.J., stated that in consequence of the conflict of decisions, the impossibility of taking the question to error, and the great desirability of establishing an uniform practice, it was intended to hold a conference of the judges to discuss the subject.

Cur. adv. vult.

Nov. 20. LORD COLERIDGE, C.J., announced that the majority of the judges were in favour of following the decision of the Court of Common Pleas in *Jackson* v. *Spittal* (2); that the judges of the Court of Queen's Bench, though still remaining of the same opinion as before, had for the sake of conformity agreed to be bound by the opinion of the majority, and that consequently in future all the Courts would act upon the decision in *Jackson* v. *Spittal*. (2) The rule would therefore be discharged.

Rule discharged.

Attorneys for plaintiff: *Gregory, Rowcliffe, & Rawle.*
Attorneys for defendant: *Linklater & Co.*

(1) Law Rep. 3 Q. B. 340. (2) Law Rep. 5 C. P. 542.
(3) Law Rep. 6 Ex. 46.

JACKSON *v.* THE METROPOLITAN RAILWAY COMPANY. 1874

Nov. 13.

Railway Company—Negligence—Over-crowding Carriages—Insufficiency of Staff to control the ordinary Assemblage of Passengers at Stations.

The plaintiff was a passenger by the defendants' railway. At G. station, the compartment in which the plaintiff was being already full, three extra passengers got in, notwithstanding the plaintiff's remonstrances. At the next station the plaintiff again remonstrated, and, there being a large number of persons on the platform and few porters in attendance, the carriage-door was opened, and more attempted to enter the carriage, but were prevented by the plaintiff and the other passengers. After the train had moved on, the carriage-door remaining open all along the platform, a porter slammed the door to just as it was entering the tunnel; and the hand of the plaintiff, in consequence, as he swore, of the inconveniently crowded state of the carriage, was crushed in the hinge:—

Held, that, though, taken singly, these several circumstances might not have been sufficient evidence of negligence to charge the defendants, yet, combined, they shewed such a careless and improper mode of conducting the business of the company as to justify the jury in finding them guilty of negligence which was a cause of the accident.

This was an action for negligence on the part of the Metropolitan Railway Company, whereby the plaintiff sustained injury.

The cause was tried before Brett, J., at the sittings in London after last Michaelmas Term. The facts were as follows:—On the 18th of January, 1872, the plaintiff was a third-class passenger by the defendants' railway between Moorgate Street and Westbourne Park. On the arrival of the train at the Gower Street station, the compartment in which the plaintiff sat contained the full complement of passengers, viz. ten, when three additional persons got in, notwithstanding the strong remonstrances of the plaintiff, and stood in front of him, to the great inconvenience of the plaintiff and the other passengers. When the train reached the Portland Road station, there was a considerable number of persons on the platform, and, although none had got out, several more attempted to get into the carriage, but were prevented by the plaintiff and the other passengers, and the carriage-door was opened by some one after the train was put in motion. A porter closed the door hastily, just as the carriage was entering the

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tunnel, and the plaintiff, who was sitting next to the door, in the struggle occasioned by the excessive number of persons in the carriage, and the attempts of the others to get in, got his thumb crushed between the hinge of the door and the door-jamb.

It was left to the jury to say whether the defendants were guilty of negligence, and whether there was any contributory negligence on the part of the plaintiff. The jury returned a verdict for the plaintiff, damages 50*l.*; and, in answer to a question put to them by the learned judge, they said: "We think the accident was caused by the presence of the three extra persons in the carriage, and that they were there through the default of the company's servants."

M'Intyre, Q.C., in Hilary Term last, obtained a rule nisi to enter a nonsuit or a verdict for the defendants, pursuant to leave reserved to him at the trial, on the ground that there was no evidence of negligence proper to be left to the jury; or for a new trial, on the ground that the verdict was against the weight of evidence.

Nov. 13. *Macrae Moir* and *Glyn* shewed cause. The answer given by the jury to the question put to them by the learned judge was no part of the verdict. The only questions for consideration upon this rule are,—first, whether there was any evidence which was reasonably fit to be laid before the jury, of negligence on the part of the defendants,—secondly, whether the verdict which they gave was against the weight of evidence. The negligence charged against the defendants consists of three several acts or defaults,—allowing the three extra or additional passengers who got in at Gower Street station to remain in the carriage on the arrival of the train at the Portland Road station; permitting so many persons to be on the platform at the latter station as to be beyond the control of the defendants' servants there; and the act of the porter in slamming to the carriage-door without warning and without seeing that there was nothing in the way. The non-observance of proper precautions in respect of these three things clearly was some evidence of negligence on the part of the com-

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pany. And there was no pretence for saying that there was any contributory negligence on the part of the plaintiff.

[BRETT, J. At Portland Road station, where the accident happened, the door of the carriage had been shut and the train had started, when some one re-opened the door and several persons attempted to get into the carriage, and the plaintiff in trying to keep them out got his thumb in the door-jamb, when the porter closed the door again.]

It was the duty of the company to have a sufficient staff at each of their stations to prevent people from attempting to get into a full carriage after a train had started. *Hogan* v. *South-Eastern Railway Co* (1) is an authority to shew that the allowing a platform to be overcrowded, and not providing adequate protection in the case of an unusual influx of passengers thereat, constitutes a good cause of action; and that the question is one for the jury, and not for the Court. By the improper overcrowding of the carriage at the Gower Street station, the plaintiff and the other passengers in that compartment were put in an inconvenient and helpless position, but for which the accident would not in all probability have happened. In *Fordham* v. *London and Brighton Railway Co.* (2), Kelly, C.B., says: "Suppose the time had arrived for closing the door, the guard should have done as was done in *Richardson* v. *Metropolitan Railway Co.* (3), viz. given warning before closing it. Here no warning was given, but the door was slammed to without looking to see if there was anything in the way." As to the verdict in this case being against the weight of evidence,—the whole of the facts were before the jury, a special jury summoned at the instance of the defendants, and there was abundant to justify the conclusion they came to.

M'Intyre, Q.C., and *Kemp*, in support of the rule. It is conceded that the train had started from Gower Street with three persons beyond the proper complement in the compartment in which the plaintiff was. At the Portland Road station, the door of the carriage had been opened and shut and the train had started. Up to that moment there was no negligence on the part

(1) 28 L. T. (N.S.) 271. (2) Law Rep. (in error) 4 C. P. 619.
(3) Law Rep. 3 C. P. 374, n.

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of any servant of the company at that station. After this, some persons who were upon the platform re-opened the door and attempted to get in. To prevent this, the porter just before the train was leaving the station shut the door, having no notice that the plaintiff's hand was in the way. It was the porter's duty to shut the door, under the circumstances. He would have been guilty of a gross breach of duty if he had allowed the train to depart with a carriage-door open. What, then, caused the accident? There was no negligence on the part of the porter in pushing away the people who were attempting to get into the carriage after the train had started, or in closing the door. The only persons who were guilty of anything that could be called wrongful, were the persons who improperly got into and persisted in remaining in a carriage which was already full, or those who improperly opened the door in order to get in whilst the train was in motion.

[LORD COLERIDGE, C.J. The facts must be looked at as a whole. Here was an overcrowded station, with an insufficient staff of porters to control the conduct of the people there assembled, a carriage with an excessive number of passengers in it, and more attempting to intrude, whereby those who were lawfully seated therein were placed at disadvantage. Do not these facts constitute some evidence of a negligent conduct of the business of the company which was a cause of the accident?]

The crowded station at Gower Street and the presence of the three extra passengers had nothing to do with the accident; the proximate cause of it must be looked for at the Portland Road station.

[LORD COLERIDGE, C.J. But for the general misconduct of the company, the plaintiff's hand would not have been placed or pushed where it was. The company should take care that there is no excessive crowding, and that the number of porters at each station is adequate for the protection of their passengers.]

Unless the proximate cause of the injury to the plaintiff was an act of negligence on the part of the company, they are not liable.

[BRETT, J. By itself, the getting in of the three extra pas-

sengers at Gower Street station might amount to nothing. But, was it not some negligence on the part of the company to allow them to remain in when the train reached Portland Road station? Can it be said that that did not contribute to the accident?]

The company no doubt had a legal right to turn them out: but the enforcement of that right, or it may be that duty, is absolutely impracticable where trains are dispatched at such short intervals and in such a rapid manner as here. The getting in of those three persons and the omission to remove them were facts too remote to give a cause of action. Besides, there was no evidence that the presence of the three extra passengers was communicated to the company's servants at the Portland Road station. The train had started in safety with those three persons in the carriage. The causa causans, therefore, must be looked for elsewhere. It evidently was the improper conduct of the persons who subsequently opened the carriage-door and attempted to force themselves in. This was no act of the company, but the act of strangers. At all events, the verdict has passed upon evidence which cannot be held to be satisfactory.

LORD COLERIDGE, C.J. I am of opinion that this rule should be discharged. I think there was evidence from which the jury might reasonably conclude that there had been negligence on the part of the company which was the cause of the injury to the plaintiff, without any contributory negligence on the part of the plaintiff himself. It was not, indeed, suggested that there was any negligence on the part of the plaintiff: but the contention on the part of the company was, that there was no evidence of negligence on their part which conduced to the injury. I am fully sensible that, in dealing with questions of this sort, we ought not to make a railway company answerable for an accident by general evidence of loose and improper conduct in the management of their business. But in this case I think there are two points at least in which there was reasonable evidence to warrant the jury in finding that the company had been guilty of negligence. It was proved that, when the train left Gower Street station, there were in the division or compartment of the carriage

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in which the plaintiff was three persons more than the full complement for that compartment. It may be that there was no actionable negligence on the part of the company in allowing too many persons to get into the carriage: it would be difficult at all times to guard against that, and perhaps there would be no help for it until the arrival of the train at the next station. The presence of too many persons in the carriage would naturally be productive of discomfort to the other passengers who were rightfully there, and impose upon them an undue and unreasonable restraint: and, when the train arrived at the Portland Road station, I think the permitting the extra number of persons to remain in the carriage, and to continue to impose that undue restraint and discomfort upon the other passengers, was evidence of negligence on the part of the company. I think, further, that the jury had a right to consider the general conduct of the business of the company, in this sense:—There was evidence that at the several stations a large number of persons had accumulated on the platform. That of itself may not have been the fault of the company; but, if that is the ordinary and well-known practice, it casts upon the company a duty, which they cannot without negligence disregard, to have a proper number of attendants to exercise proper control over the movements of the persons so collected. And here there was evidence (and no evidence the other way) from which I think the jury might reasonably conclude that there was no sufficient staff of porters employed for the performance of that duty. It is enough to say that there were two matters in respect of which there was negligence,—first, the permitting the three extra persons to remain in the carriage when there was an opportunity of removing them,—secondly, the absence of a sufficient number of persons in attendance on the platform to control the large number of persons assembled there.

It is said that the servants of the company at the Portland Road station had no notice of the presence of the three extra persons in the carriage. Assuming that to be so, I think there was no necessity for giving them such notice. It was incumbent on the company to have a sufficient number of attendants at each station

to see that their carriages were not overcrowded. I think there was evidence upon which the jury were well warranted in finding negligence in the two particulars I have referred to. It must also appear, however, that the negligent conduct of the company was *a* cause of the accident. Without going unnecessarily into the details of the circumstances under which the rush of persons took place on the platform, and hampered the plaintiff and the rest of the passengers in the reasonable freedom of their movements, it is enough to say that, given these two points, there was also evidence that they were a contributory cause of the injury to the plaintiff, without any contributory negligence on his part,—evidence, at all events, to go to the jury.

As to the verdict being against the weight of evidence, I do not understand my Brother Brett to express himself dissatisfied with their finding. On both grounds, therefore, I think the rule should be discharged.

BRETT, J. The leave reserved by me at the trial was, to enter a verdict for the defendants if the Court should be of opinion that there was no evidence of negligence proper to be left to the jury. It follows, therefore, that, if the Court think that there was any evidence upon which the jury might reasonably act, they cannot set aside the verdict as being against the weight of evidence. After mature consideration, I am of opinion that there was evidence upon which the jury might reasonably find for the plaintiff. It may be that the negligence at Gower Street station did not contribute to the accident. And I agree with Mr. M'Intyre that the company are not responsible for the wrongful acts of the crowd at Portland Road station, if these alone were the cause of the accident. In my opinion, also, there was no evidence of negligence in the porter shutting the carriage-door as he did at the last-mentioned station. But I think that allowing three more than the proper number of passengers to be in the compartment in which the plaintiff was, without seeing and putting an end to the inconvenience before the train was allowed to start from the Portland Road station, was evidence of negligence on the part of the company. It not being an extraordinary state of things to find a very large

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number of persons on the platform at that station, the company ought to have a sufficient staff of porters there to control and regulate the ordinary acts of such a crowd of irresponsible persons. The evidence of these things combined fully justified the jury in finding that the company had been guilty of negligence. Probably the wrongful conduct of the crowd at the station in some degree contributed to the accident. But, where negligence is proved, it is no answer on the part of the company to say that the wrongful acts of other persons also contributed. There being evidence, then, which it was proper to submit to the jury, and they having found for the plaintiff, even though I myself might have entertained a different opinion, I do not feel myself at liberty to interfere with their finding.

GROVE, J. I am of the same opinion. It is impossible to define accurately what is causa proxima and what remota; a cause may be proximate in one aspect and remote in another. We must form our minds in the best way we can in these cases as to whether or not the alleged negligence is reasonably near enough to be fairly said to be the cause of the accident. The argument for the defendants amounts to this, that either element of the alleged negligence here, taken by itself, could not be said to have been the proximate cause of the accident. There were two elements for the consideration of the jury. In the first place, the permitting three persons wrongfully to enter at the Gower Street station a carriage which was already full, which, apart from the other circumstances, perhaps, would not be sufficient to fix the defendants. In the next place, the allowing those three extra persons to remain in the carriage when the train reached the Portland Road station, notwithstanding the remonstrances of the plaintiff and the other persons in the carriage, which clearly to my mind constituted such a degree of negligence on the part of the servants of the company as to render the company liable. Then, the carriage-door, it seems, was opened by some one at the Portland Road station, and more persons attempted to enter, but were prevented by the plaintiff; and the door remained open until the train was just entering the tunnel, when a porter shut or "slammed" it to. I do not say that

the act of shutting the door was in itself an act of culpable negligence. It was better, perhaps, that the door should be shut. But all the circumstances were fit for the consideration of the jury. The state of things, then, seems to be this:—There was a crowd of persons at Gower Street station. Three more than the regulation number got into the compartment in which the plaintiff was. When the train arrived at Portland Road station, no attempt was made by the servants of the company to remove those three extra passengers; and they were allowed to remain. At this station, too, there was a large crowd, and a rush was made by some persons to get into the carriage. The door was opened by some one, and it was open as the train moved on all along the platform, and was slammed to just as it reached the end. Do these facts shew a degree of negligence against which the company might and ought reasonably to be required to have provided? The plaintiff, it seems, expostulated against the admission of the three extra passengers at Gower Street station; and he was still more vigorous in his expostulations at Portland Road station. All these circumstances were, I think, proper to be submitted to the jury to enable them to form a judgment as to whether or not the defendants were guilty of negligence in the conduct and management of the traffic on their railway,—more particularly at the station at which the accident happened; and I see no reason to find fault with the result of their deliberation.

Rule discharged.

Attorney for plaintiff: *W. W. King.*
Attorneys for defendants: *Burchells.*

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Marine Insurance—Insurable Interest—"Cargo"—Seaworthiness—Peril of the Sea—Evidence—Burthen of Proof.

A ship, whose cargo was insured, began suddenly to leak, and sank at her anchors, in port, during fine weather. Evidence was given in an action on the policy on the part of the assured tending to shew that the ship was seaworthy, e. g. evidence that she had been recently put in thorough repair, that careful surveys of her had been made just previously, and that she had behaved perfectly well on previous voyages, and on her voyage to the port where she was lost. No evidence was given of any actual facts shewing the cause of her loss, although possible explanations of it by way of conjecture were suggested by the witnesses:—

Held, that, in the absence of any other evidence as to the condition of the ship, the fact of her sinking in smooth water without any apparent cause would create an irresistible presumption of unseaworthiness; but that when there is other evidence of the condition of the ship or of the cause of loss, the fact of the ship's sinking in smooth water becomes one of several facts which must all be left to the jury; and, if they conclude on the evidence that the ship was seaworthy, they may find that she was lost by a peril insured against, though unable to ascertain or safely conjecture what such peril was.

The plaintiff, a merchant in London, contracted with B. S. & Co., of Calcutta, for the purchase of rice, as follows: "Bought for account of A., of B. S. & Co., the cargo of new crop Rangoon rice, per *Sunbeam*, 707 tons register, at 9*s*. 1½*d*. per cwt. cost and freight, expected to be March shipment, but contract to be void should vessel not arrive at Rangoon before April, 1871. Payment by sellers' draft on purchasers at six months sight with documents attached."

The *Sunbeam* was chartered by the sellers' agent to proceed to Rangoon to ship a cargo of rice for any port in the United Kingdom or Continent. The plaintiff effected an insurance with the defendant as follows: "At and from Rangoon to any port or place of discharge in the United Kingdom or Continent, by the *Sunbeam*, warranted to sail from Rangoon on or before the first of April, on rice, as interest may appear, amount of invoice to be deemed the value: average payable on every 500 bags: the said merchandizes, &c., are, and shall be valued at 5500*l*., part of 6000*l*." The *Sunbeam* arrived in the Rangoon river on the 3rd of March, and commenced loading a cargo of rice. She had taken on board 8878 bags of rice, and the 400 bags more, which would have completed her cargo, were in lighters alongside, when, having begun leaking suddenly, she sank, and was lost with the rice on board of her. The captain afterwards signed bills of lading for the cargo shipped, which were indorsed to the plaintiff, and the sellers drew bills of exchange for the price of such cargo, which were accepted and met by the plaintiff. It was contended that the plaintiff had no insurable interest in the rice shipped on board the *Sunbeam*:—

Held, that the rice already shipped in the *Sunbeam* at the time of the loss was so far appropriated to the contract by the vendors that they could not withdraw it without the consent of the purchaser; that the purchaser, though he had an

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option under the contract to reject anything which fell short of a full cargo, was entitled to elect to treat what was on board as a cargo, and insist on its delivery; that, on the construction of the contract, the property in the "cargo" sold was to pass on its being loaded, and consequently, if the purchaser elected to receive an incomplete cargo, even though he did not declare such election till after the loss, the property in such cargo must be treated as having been in him from the loading, and that consequently the plaintiff had an insurable interest in the rice loaded at the time of the loss.

Held further, that even if the property in the rice did not legally pass to the plaintiff, yet he had an insurable interest in it because he had an existing contract with regard to it from the time of its being loaded on board, by virtue of which he had an expectancy of benefit and advantage arising out of or depending on the safe arrival of the rice.

Held further, that the policy was a valued policy, the valuation being the amount of the proper invoice according to contract between the plaintiff and his vendors.

Reversed in Ex Ch 5 Com 609 W

ACTION upon a policy of marine insurance.

The pleadings and facts sufficiently appear from the judgment. At the trial before Brett, J., at the sittings in London after Hilary Term, 1874, a verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a verdict, if there was no evidence of a loss by the perils insured against, or if the evidence shewed that the ship was not seaworthy, or if it shewed that there was no insurable interest.

A rule nisi was obtained accordingly, and also for a new trial, on the ground that the verdict was against evidence, and to reduce the damages.

Sir H. James, Q.C., Watkin Williams, Q.C., and *J. C. Mathew,* shewed cause. There was clearly an insurable interest in the rice on board. That in which the contract of sale gave the plaintiff such an interest was a "cargo" of rice. The amount shipped was substantially a cargo; and the whole cargo had been specifically appropriated to the contract, inasmuch as the remainder was alongside. It is not necessary that the property should have passed to the assured in order that there may be an insurable interest: *Joyce* v. *Swann* (1); *Seagrave* v. *Union Marine Insurance Co.* (2); *Ireland* v. *Livingston.* (3) It is sufficient if the specific rice was finally appropriated to the contract, and so the

(1) 17 C. B. (N.S.) 84, 104. (2) Law Rep. 1 C. P. 306.
(3) Law Rep. 2 Q. B. 99; Law Rep. 5 H. L. 395.

10 Jurist Ex Ch affirmed 6 H & N 100 Cas 713.

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assured had an interest in it or an expectation of profit arising out of it. In *Ebsworth* v. *Alliance Marine Insurance Co.* (1), where the circumstances were similar, there was no difference of opinion as to there being an insurable interest, the only question was whether it was for the whole of the value or part only. The question is in reality one of fact; as soon as the cargo of the *Sunbeam* comes into existence there is a subject-matter of the contract of sale, and also of the insurance in which the plaintiff has an insurable interest. It is contended that when all the cargo, except an insignificant fraction, had been shipped and the remainder was alongside, the cargo of the *Sunbeam* did exist in specie and the plaintiff had an insurable interest in it. The vendors could not, without breach of contract, have withdrawn the rice so appropriated to the contract. The fact that the purchaser might still have a right of rejecting the rice does not prevent there being an insurable interest. [They cited on this point: *Houghton* v. *Gilbart* (2); *Sargent* v. *Reed* (3); *British Columbia Saw Mill Co.* v. *Nettleship* (4); *Kreuger* v. *Blanck* (5); *Sparkes* v. *Marshall* (6); *Castle* v. *Playford.* (7)] With regard to the questions of seaworthiness and whether there was a loss by the perils of the sea, it cannot be laid down as the law that, unless the assured can explain the cause of the loss they cannot recover. The evidence of the plaintiff in this case shewed that the ship was seaworthy: the only case to the contrary on which the defendant can rely beyond the merest conjecture is the fact that the plaintiff cannot explain the cause of the loss. The loss is primâ facie by a peril insured against, i.e. by the sea rushing into the ship and sinking her; the fact that the cause of this cannot be explained does not amount to evidence of unseaworthiness or shew that the ship perished by her own inherent defect, not by the perils insured against. [They cited on this point *Dixon* v. *Saddler* (8); *Cullen* v. *Butler* (9); *Davidson* v. *Burnand.* (10)]

Sir J. B. Karslake, Q.C., *Butt, Q.C.*, and *Cohen, Q.C.*, supported

(1) Law Rep. 8 C. P. 596.
(2) 7 C. & P. 701.
(3) 2 Str. 1228.
(4) Law Rep. 3 C. P. 499.
(5) Law Rep. 5 Ex. 179.
(6) 2 Bing. N. C. 761.
(7) Law Rep. 7 Ex. 98.
(8) 5 M. & W. 405; 8 M. & W. 895.
(9) 5 M. & S. 461.
(10) Law Rep. 4 C. P. 117.

the rule. The mere fact of the vessel's sinking is no proof of a loss by perils of the sea, even admitting that she were seaworthy. But it is contended that the fact of a ship sinking in smooth water, without any assignable external cause, is the strongest evidence of unseaworthiness. If a house fell down without assignable cause could that be a proof that it fell from some cause other than its own defect? It is contended that the burthen of proof that the vessel was lost by a peril of the sea is on the plaintiff, and it is not a proper direction to give the jury that if the vessel were seaworthy, then the mere fact of her going down is evidence of a loss by the perils of the sea. Assuming that there was evidence of a loss by perils of the sea, then it is contended that there was irresistible evidence of unseaworthiness in the mere fact that the vessel sank in port in fine weather without its being possible to shew any reason, except the merest conjecture, for her so doing.

No other cause being discovered for the vessel's sinking, primâ facie the presumption is that it was caused by some defect in her condition at the time. [They cited on this point *Thompson* v. *Hopper* (1); *Faucus* v. *Sarsfield* (2); *Busk* v. *Royal Exchange Assurance Co.* (3); *Giblin* v. *McMullen* (4); *Watson* v. *Clark* (5); *Parker* v. *Potts* (6); *Douglas* v. *Scougall* (7); *Prescott* v. *Union Marine Insurance Co.* (8); *Paterson* v. *Harris.* (9)]

It is contended that the plaintiff had no insurable interest in the present case. The fact of the plaintiff's choosing to take to the rice, although not bound to do so by the contract, cannot affect the question. The subject-matter of the contract in which the plaintiff's interest was to arise was the cargo of the *Sunbeam.* That cargo never came into existence. The plaintiff's interest was altogether executory. The sellers provided the ship; they might have changed the destination of the rice in the lighters, or even have withdrawn the rice already on board. They would be guilty of a breach of contract if they did not supply a cargo of rice for the *Sunbeam,* but the plaintiff would have no claim as to any

(1) E. B. & E. 1038; 26 L. J. (Q.B.) 18.
(2) 6 E. & B. 192; 25 L. J. (Q.B.) 249.
(3) 2 B. & Ald. 73.
(4) Law Rep. 2 P. C. 317, 335.
(5) 1 Dow. H. L. 344.
(6) 3 Dow. H. L. 23.
(7) 4 Dow. H. L. 269.
(8) 1 Whart. Penn. 399.
(9) 1 B. & S. 336; 30 L. J. (Q.B.) 354.

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specific rice. It is contended that the property must pass in order that there may be an insurable interest. The contract of marine insurance is a contract of indemnity. The plaintiff never became bound to take the rice or to pay the price: it was not a complete cargo; bills of lading had not been signed at the time of the loss. The price never could be ascertained as provided for by the contract, inasmuch as the rice could not be weighed: it is necessary that the purchaser should assent to the appropriation of the rice before it can be finally appropriated to the contract. The intention of the contract is that the property should not pass till the drafts are signed and delivered against the shipping documents. If the legal property is not necessary to constitute an insurable interest there must be such an interest in law or equity as to entitle the insurer to have the specific thing appropriated to his use. There is not such an interest here. There might possibly be a right to insure profits to arise out of an executory contract; that is an altogether different thing from an insurable interest in the subject-matter of the contract itself. Can it be said in any sense that the loss of the rice was the plaintiff's loss of the rice? It is admitted that a man may insure as agent, and so the plaintiff might have insured as the agent of the sellers, but there is no suggestion that that was the case here. [They cited on this point *Lucena* v. *Craufurd* (1); *Warder* v. *Horton* (2); *Crowley* v. *Cohen* (3); *Browne* v. *Hare* (4); *Bank of Ireland* v. *Perry* (5); *McSwinny* v. *Royal Exchange Insurance Co.* (6); *Fothergill* v. *Rowlands* (7); *Stockdale* v. *Dunlop* (8); *Wait* v. *Baker* (9); *Tamvaco* v. *Lucas* (10); *Aldridge* v. *Johnson* (11); *Chope* v. *Reynolds*. (12)] The damages ought to be reduced, the policy not being a valued policy, inasmuch as they include 15 per cent. in addition to the invoice price of the rice.

Cur. adv. vult.

(1) 3 B. & P. 75; 2 B. & P. N. R. 269.
(2) 1 Binn. Penns. 529.
(3) 3 B. & Ad. 478.
(4) 3 H. & N. 484; 4 H. & N. 822; 27 L. J. (Ex.) 372; 29 L. J. (Ex.) 6.
(5) Law Rep. 7 Ex. 14.
(6) 14 Q. B. 634.
(7) Law Rep. 17 Eq. 132.
(8) 6 M. & W. 224.
(9) 2 Ex. 1; 17 L. J. (Ex.) 27.
(10) 1 E. & E. 581; 28 L. J. (Q.B.) 301. 3 Jur. N.S. 1258.
(11) 7 E. & B. 885; 26 L. J. (Q.B.) 296. 3 Jur. N.S. 913
(12) 5 C. B. (N.S.) 642; 28 L. J. (C.P.) 194. 5 Jur. N.S. 822

Nov. 2. The judgment of the Court (Lord Coleridge, C.J., and Brett and Denman, JJ.) was delivered by

BRETT, J. In this case the action was brought to recover upon a policy of insurance signed by the defendant for indemnity in respect of a cargo of rice alleged to have been lost by perils of the sea.

The main defences were, that there had been no loss by perils of the sea, that the ship was unseaworthy when the policy attached, and that the plaintiff had no insurable interest in the cargo at the time of the loss.

The plaintiff, a merchant in London, entered on the 2nd of February, 1871, into a contract with Barradaile, Schiller, & Co., of Calcutta and London, for the purchase of a cargo of Rangoon rice per *Sunbeam*, at 9*s.* 1½*d.* per cwt. The bought-note was in the following terms:—"2nd February, 1871. Bought for account of Anderson & Co. of Barradaile, Schiller, & Co., the cargo of new crop Rangoon rice per *Sunbeam*, 707 tons register, No. 1254 in veritas, at 9*s.* 1½*d.* per cwt., cost and freight, expected to be March shipment: but contract to be void should vessel not arrive at Rangoon before April, 1871. Payment by sellers' draft on purchasers at six months sight, with documents attached."

The *Sunbeam* did not belong either to the sellers or the purchaser. She was chartered by the sellers' agents "to proceed to Rangoon to ship and carry a cargo of rice to any port in the United Kingdom or Continent."

On the 3rd of February, 1871, the plaintiff effected insurance with the defendant, "at and from Rangoon to any port or place of discharge in the United Kingdom or Continent, by the *Sunbeam*, warranted to sail from Rangoon on or before the 1st of April, on rice, as interest may appear: amount of invoice to be deemed the value: average payable on every 500 bags: the said merchandizes, &c., are and shall be valued at 5500*l.*, part of 6000*l.*"

The *Sunbeam* arrived in the Rangoon river on the 3rd of March, 1871, and was anchored in the usual anchorage, at the junction of the rivers Rangoon and Pegu, about four miles below the town of Rangoon. She was anchored by two anchors in a somewhat peculiar way, much discussed before the jury and afterwards before the Court. When the ship was first brought up, it was by

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one anchor with sixty fathoms of chain. The ship was, therefore, then, and when she swung with the next tide, sixty fathoms from her anchor. After she had thus swung, her second anchor was let go. It would at that moment have no effect: it would be under the bows of the ship, which would be held by her other anchor with the sixty fathoms chain. But, when the ship swung at the next tide, she was checked by this second anchor to which thirty fathoms of chain was then given, which stopped the ship at thirty fathoms from that anchor as and when she had gone thirty fathoms towards her first anchor. The chain of that first anchor was then taken in to thirty fathoms, so that the anchors were sixty fathoms apart, one being up and the other down the river, and the ship was held by the bows midway between them, that is to say, at thirty fathoms from each,—held by the one or the other as the tide was on the ebb or flood. The draught of the ship when most loaded was 19 ft. 6 in. The depth of water where she lay was 22 feet at low water. The bottom of the river generally was soft mud of some feet in depth. The tide is strong in the Rangoon river.

The ship discharged ballast and began to load rice early in March. The captain was anxious to complete loading by the 1st of April, on account of the orders to do so, and to secure a gratuity due to him if he should do so. The rice was brought to the ship in lighters from stores near the town of Rangoon, and was carried on board the *Sunbeam* and there stowed by coolies. On the 30th of March, the ship was nearly loaded. There were 8878 bags then on board. Four hundred more bags would have completed the cargo, and they were in lighters alongside. The loading had been much accelerated during the latter days of loading. On the morning of the 30th of March, the ship suddenly made a great deal of water. This, in spite of every exertion, increased with great rapidity, so that in the course of the night the ship sank at her anchors and was totally lost, as was also all the cargo then on board. After the ship had sunk, and after ship and cargo were lost, and in order to enable the plaintiff to claim on the policy, the captain signed bills of lading for the cargo which had been shipped, and the sellers drew bills of exchange for the price of such cargo, which were accepted and met by the plaintiff.

The bills of lading were indorsed to him. All this was fully disclosed to the underwriters when the claim was made.

On the trial at Guildhall, at the sittings after Hilary Term, 1874, before Brett, J., the plaintiff gave evidence that the ship was an American-built ship, of 707 tons register; that she was reclassed in New York in 1869; that she made several long voyages, behaving extremely well; that she carried a cargo of coals in the summer of 1870 from Liverpool to Point de Galle, being on that voyage perfectly dry and tight. She sailed from Point de Galle to Rangoon in ballast, therefore light, and with her topsides out of the water. She sailed on a smooth voyage, with fine weather; but in the hottest and driest months of the year. She did not leak at all on that voyage. Neither did she leak at all as she lay in the Rangoon river up to the 30th of March. The captain and mate, examined and cross-examined on a commission, gave evidence that the caulking of the topsides of the ship was examined in the Rangoon river shortly before the 30th of March, and was found to be in good order. The captain also gave evidence as to hearing, when the ship began to make water, a rush of water into the ship towards the stern of the ship, under the lazarette in one place, and that he heard no sound of the coming in of water in the forward parts of the ship.

The only evidence given by any witnesses on board the ship, or who were at Rangoon at the time, either on behalf of the plaintiff or defendant was that given by the captain and mate. But, on the trial, witnesses were called, both on behalf of the plaintiff and the defendant, who gave evidence as to the Rangoon river, and the customs and habits therein, and who gave opinions as to how the loss of the ship and cargo might and might not have happened. It was suggested by the witnesses on behalf of the plaintiff that the ship was perfectly sound, but that she might have sat upon one of her anchors, or have pricked herself in passing over one of her anchors, or might have struck on a ballast heap formed in the river by an alleged practice of ships to throw stone-ballast overboard in the river, and by so striking have strained herself or have displaced her rudder-post.

The jury suggested that she might have taken the shelving side of the river in swinging, and have so been strained.

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Evidence was given on behalf of the defendant, that, in the opinion of the witnesses who gave the evidence, none of these things could have happened, and, at all events, not without the knowledge of those on board the ship, who had never suggested any of them.

On behalf of the defendant, it was suggested by witnesses, that, although the ship was perfectly tight and dry when she left Point de Galle, yet that the voyage in ballast thence to Rangoon in the hot and dry weather, with the topsides out of the water, might have caused the caulking of the topsides to become dry and leave the seams open; that the caulking might not have been repaired at Rangoon; that the quick immersion of the topsides by the quick loading of the later days might have caused the water to come through the dried-up seams before they could by the immersion take up; and that the insufficiency of the caulking of the seams might have been the real cause of the loss. They suggested that the opening of the seams existed at the time when the loading of the ship commenced and the policy attached.

Upon these facts and this evidence, the jury found a verdict for the plaintiff, leave being reserved to enter the verdict for the defendant if there was no evidence of a loss by perils insured against, or if the evidence shewed that the ship was not seaworthy, or if it shewed that there was no insurable interest.

On a motion made accordingly, and for a new trial on the ground that the verdict was against the weight of evidence, or to reduce the damages, a rule was granted and cause was shewn.

It was argued on behalf of the defendant, that the fact of the ship sinking in smooth water so soon after the commencement of the risk, raised a presumption that the ship was unseaworthy when the policy attached; and that such presumption was not removed by speculative suggestions; and that, consequently, the jury ought to have been directed to find, according to the legal presumption, that the ship was unseaworthy. It was further contended that, if the ship was seaworthy at the commencement of the risk, yet that there was no evidence that she was lost by any peril insured against, and that the jury therefore ought to have been directed to find for the defendant that there was no loss by perils of the sea. It was further contended that there was no insurable interest,

first, because no property passed in the rice which was lost, viz. the rice which was on board. The reasons given for this contention were that the plaintiff had bought "the cargo" of the *Sunbeam*, and that, until the ship had finished loading, "the cargo" did not exist; and, if it did, yet that the cargo had not been weighed, and weighing was necessary in order to ascertain the price to be paid; that the time of payment had not arrived, and that there was no appropriation of a cargo assented to by the purchaser before the loss. Another reason alleged against there being an insurable interest was that, at the time of the loss, no liability to pay for the rice attached to the plaintiff according to his contract with the sellers, and therefore he had nothing at risk, he suffered no pecuniary loss by the destruction of the rice.

It was contended that the damages ought to be reduced, on the ground that the policy was not a valued policy, and that the verdict included not only the invoice price of the rice, but 15 per cent. added to it.

It was contended on the part of the plaintiff that there was more evidence as to seaworthiness than mere suggestions, that there was evidence of facts fit to be left to the jury, on which the jury might properly find that the ship was seaworthy. It was further contended that, if the jury should find that the ship was seaworthy, they were entitled to find that she was lost by a peril insured against, even though they could not determine what the accident was which caused the ship to sink. It was urged that there was evidence of facts which supported reasonable suggestions as to the cause of the ship's sinking. As to the question of insurable interest, it was argued that the property in the rice on board had passed; that, if not, it was not necessary that it should; that it was so appropriated to the contract that the plaintiff might properly be said to have an interest in a contract applicable to that rice; and that such interest was a sufficient insurable interest in the rice to enable him to insure it as rice.

As to the amount of the verdict, it was contended that the policy was in legal effect a valued policy, properly valued at the amount of the invoice agreed upon between the buyer and sellers.

Dealing, first, with the questions raised as to seaworthiness and loss by a peril insured against, we think that, where the only

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evidence of fact as to either of those questions is, that the ship sank in smooth water very soon after the attaching of the policy, the significance of such a fact cannot be displaced by mere opinion founded on mere conjecture. We think that the true significance of such evidence is to be termed a presumption, and a shifting of the burden of proof; and that, where such a fact is the only fact in evidence, there being no other evidence as to the condition of the ship, or as to a cause of loss, it is evidence on which a jury ought to find, and should therefore be directed to find, if they believe the evidence, that the ship was unseaworthy at the inception of the risk. But, where there is other evidence of the condition of the ship, or of a cause of the loss, then the fact of the ship sinking in smooth water becomes one of several facts which must all be left to the jury. If from other facts—such as a large amount of repairs recently done, careful surveys recently made, excellent conduct of the ship up to a time immediately preceding the loss, or otherwise—a jury conclude that the ship was seaworthy at the inception of the risk, then the jury may further find that the loss was occasioned by a peril insured against, though they are unable to ascertain or safely conjecture what it was which caused the ship to sink. The immediate visible cause of the loss in such a case is the foundering of the ship. If that was not the result of unseaworthiness existing at the inception of the risk, it is difficult to see, upon the assumption, which is that there is no other evidence as to the loss than the fact of the foundering of the ship, how that could have been caused by anything but some extraordinary though invisible and unascertained accident of the seas.

We do not consider that the direction of Lush, J., upheld by the Court of Common Pleas, in *Merchants Trading Co.* v. *Universal Marine Assurance Co.* (1), is in conflict with these propositions.

It was suggested that the learned judge had directed the jury that, even though the ship were seaworthy at the inception of the risk, yet she might have foundered through wear and tear caused by no extraordinary action of the sea, and, if so, it was not a loss by a peril insured against. It is true that a foundering from such wear and tear would not be a loss by a peril insured against; but it is equally true that, if a ship cannot pass through an insured

(1) Not reported.

voyage without foundering from the effects of wear and tear occurring without extraordinary action of sea or wind, such ship was unseaworthy at the inception of the risk, she was then incapable of sustaining the ordinary casualties of an ordinary voyage. We do not understand that either the learned judge or the Court in banc treated the question of wear and tear as different from or independent of the question of whether the ship was seaworthy or not; but that the judge was reiterating in another form the alternative question which he had before stated was presented in that case, viz. whether the ship foundered by reason of unseaworthiness or of a peril of the sea. The statement of the proposition as to loss from wear and tear or by reason of a peril insured against contained in *Thompson* v. *Hopper* (1), is in one view entirely consistent with what we have enunciated; and the proposition is not inconsistent with the proposition quoted in argument from *Fawcus* v. *Sarsfield.* (2)

It becomes necessary, therefore, to consider what was the evidence in the present case. It is truly stated on behalf of the defendant that the greater part of it on both sides consisted of opinions founded on conjectured facts. And in our judgment some of those alleged facts could not have existed, and of others there was no such evidence as would entitle a jury to found a verdict on their supposed existence in fact. From the position of the anchors, the depth of water, the nature of the river's bottom, and the draft of the ship, we are strongly of opinion that the ship could not have passed over either of her anchors, and therefore could not either have sat upon her anchor or pricked herself with her anchor. Neither do we think it possible that the ship could have twisted her anchor chains so as to bring her anchors together, or have fixed across a strong tide so as to have strained herself as suggested, without her position in either respect being remarked by any officer or man on board. We think that such suggestions were unworthy of the name of evidence. We do not think that the existence of ballast heaps could be properly relied on by the jury, if it were necessary in order to support their verdict to rely upon the existence of such heaps being affirmatively proved. If

(1) 6 E. & B. 172; E. B. & E. 1038; 25 L. J. (Q.B.) 240; 27 L. J. (Q.B.) 441.
(2) 6 E. & B. 192; 25 L. J. (Q.B.) 249.

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there were no other evidence in the case but the opinions and conjectures of the skilled or experienced witnesses, and the fact of the sinking of the ship at anchor in smooth water so soon after the inception of the risk, we should be of opinion that the jury were bound to find that the ship was unseaworthy. But there was in this case evidence of large repairs done to the ship at no distant period from the loss, there was strong evidence of good behaviour of the ship on voyages immediately preceding the insured voyage, and indeed of which the insured voyage might be said to be a continuance, there was evidence of inspection by the captain of the caulking of the ship whilst at Rangoon, there was evidence as to the suddenness and localisation of a leak. We are of opinion that such evidence brought the case within the rule before enunciated, and which obliged the judge who tried the cause to leave the questions as to seaworthiness and loss by a peril insured against to the jury.

If the judge who tried the cause had had to find the verdict, and had been at liberty to conjecture, it is right to say that he would have acted upon the theory, as the most probable, of the seams of the topsides having been generally opened on the voyage from Point de Galle, and would have found that the ship was unseaworthy at the inception of the risk; but he is of opinion, and in that we agree with him, that there was evidence which made it not unreasonable in the jury to find for the plaintiff; and that he is therefore not authorized to act upon his own opinion, as against their finding, and that we should not be justified in deciding that the verdict should be set aside as being against the weight of evidence.

We are all of opinion that the verdict of the jury upon those issues must stand.

As to the question of insurable interest, it is this, whether, under the circumstances, the plaintiff at the time of the loss of the ship had a sufficient interest, including a sufficient risk of loss, in the rice which was on board the *Sunbeam* to enable him to recover for the loss of it, under an insurance of it as rice. The question is obviously confined to the rice which was on board the ship, that being the only rice which was lost or damaged. Now, we agree that the granting of the bill of lading had no

effect in passing the property, because it was granted after the loss of the ship and cargo. We agree that the acceptance and payment of the drafts for the price were of no effect to pass the property, for the same reason, because done and made after the loss of the cargo. We agree that there was no binding appropriation to the contract of the rice on board the barges, because we think that any barge-load might at any time before it was delivered into the control of the ship have been withdrawn and replaced. It seems to us that the purchaser would not have been bound to accept the rice which was on board, if the ship had arrived at her proposed destination with only so much of a full cargo as was on board, because we agree with the view of the defendant's counsel, that, by the terms of the contract of purchase and sale, the plaintiff purchased and therefore undertook to accept "the cargo per *Sunbeam*," and was entitled to reject a part cargo if offered to him. We think that, inasmuch as the plaintiff would not, if the ship had sailed and arrived with what was on board of her when she sank, have been obliged to accept what was on board, the plaintiff was not bound to pay for the rice which was on board and lost when the ship sank. But, from the fact of the ship being designated in the contract, and thereby agreed by both buyer and sellers to be the recipient of the rice to be appropriated to the contract, we are of opinion that there was such an appropriation of the rice on board to the contract as to prevent the sellers from withdrawing that rice without the consent of the buyer. We think that the executory contract as to any rice had become, as to the rice which was on board, a contract attaching to that specific rice. We agree that that does not determine the question whether the property in the rice had passed to the purchaser. Although the plaintiff could not have been forced, if the ship had sailed and arrived with only so much of a full cargo on board as was shipped and lost, to accept so much as was on board, yet we are of opinion that he would have had the legal option of requiring actual delivery of it. The sellers could not have withdrawn what was on board without breaking their contract with the plaintiff. They could not, if the ship had arrived, have defended an action for non-delivery on demand, by saying that they were not bound to deliver what had arrived on board

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the *Sunbeam*, because their agents had not shipped or had been prevented from shipping an entirely full cargo. The purchasers might have elected to treat what was on board as a cargo, and have insisted upon its actual delivery.

It seems to us, therefore, that the final question is, whether, upon such a state of facts, rights, and liabilities, the defendants (the underwriters) can allege by way of defence that the plaintiff (the assured) had not after the loss the same option as he had before it; and whether that was not the option of saying that the delivery on board the designated and agreed ship was a delivery to him, that he elected to treat the quantity on board as a cargo, that consequently he elected to say that the cargo was at his risk, and that the property in it had passed to him directly it was on board.

The solution of this question seems to us to depend upon a careful consideration of what it was which gave the option of rejection to the plaintiff. Was there anything to give him such an option other than the fact of the cargo not being a full cargo? In other words, if there had been a full cargo on board, would there have been any such option? We think not. By the contract, the cargo purchased by the plaintiff was to be shipped by the vendors on board a particular designated ship. It is true that the ship was to be taken up and the freight in the first place paid by the vendors. But the freight was specifically included in the price to be paid by the purchaser. He was in the end to pay the estimated cost of the hire of the ship. He agreed that the cargo should be shipped on board that particular ship. And the payment, so far as an acceptance is payment, was to be made perhaps before the arrival of the ship at its destination. At all events, the time of such payment was independent of the time of the arrival of the ship and the delivery of the cargo. Although the price to be paid for the cargo specifically includes the freight, it does not include the insurance. The safer proposition, under such circumstances, is, to say that the question as to which of the two parties was to insure depends upon the question of construction, whether the contract in its other stipulations discloses an intention that the cargo should on the voyage be the cargo of or at the risk of the vendors or the purchaser. It may, however, not be wrong

to observe that the plaintiff, the purchaser, before any dispute as to the interpretation of the contract arose, insured the rice per *Sunbeam* on the day after the making of the contract of purchase and sale, and that the sellers never insured it.

Considering that the cargo was to be put on board a ship so designated by the purchaser in the contract that the cargo could not, in accordance with the contract, be put on board any other ship, and that the conditional payment by acceptance was to be made independently of the time of the ship's arrival, although the ultimate price was to be ascertained by weighing the cargo, we are of opinion that, in the case of a full cargo having been shipped, the property in such cargo would, by the manifest intention of the parties, have at once upon the loading passed to the purchaser, subject to the vendor's right to stop in transitu in case of the purchaser's insolvency, and to his right to resume dominion in case of non-acceptance of the draft on presentation, or to his right to withhold actual delivery of the cargo until such acceptance. The stipulations of the contract which enabled the vendors to take the bill of lading in their own name and to send it forward with the draft, and the fact that the price was to be finally determined by ascertaining the weight of the cargo, are primâ facie evidence of an interest remaining in them; but they are not conclusive. *Seagrave* v. *Union Marine Insurance Co.* (1) And the other stipulations to which we have referred seem to us to shew that the property in the cargo was nevertheless intended to pass on the loading of it on board the designated ship; and that the stipulations as to time and mode of payment were only for the purpose of measuring the price and securing its payment: see per Cockburn, C.J., in *Castle* v. *Playford* (2), in error. The option, therefore, which the plaintiff would have had of rejecting, if it had arrived, the present cargo, arose solely from the shipment not being a full cargo. He might on that account have treated himself as not bound by the contract to accept or pay for the rice which was on board. But if he did not exercise such option, then all the terms of the contract were as applicable to the lesser as they would have been to the greater cargo ; then the property in the lesser cargo would

(1) Law Rep. 1 C. P. 305, at p. 319. (2) Law Rep. 7 Ex. 98.

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have passed to him from the loading, as much as would have the property in the larger cargo.

This view may be thus tested:—Suppose a lesser cargo shipped and dispatched, and drafts representing it sent forward, with notice that the cargo was not a full cargo; and suppose that thereupon the plaintiff had accepted the drafts or otherwise notified his intention to consider the contract binding for the lesser cargo, and that, after such notification, the ship had been lost,—is it not clear that the effect of the contract would have been the same as if a full cargo had been shipped and sent forward? and that, if a full cargo would have been at the plaintiff's risk on the voyage, the lesser cargo at the time of the suggested loss would have equally been at his risk? Unless, therefore, the plaintiff chose to disclaim the contract on the ground of there being a short shipment, the contract would have had the same application to a short as to a complete shipment; or, in other words, the property and risk in the short shipment would have passed to the plaintiff just in the same manner and to the same extent as in a full shipment.

The question, then, is, whether the existence of such an option as we hold the plaintiff to have had, and of such only, prevents the plaintiff, if he decline after the loss to exercise the option, from insisting successfully, as against the defendants, his insurers, that he had an insurable interest in the rice to its full value. We are of opinion that it does not.

In *Sparkes* v. *Marshall* (1), the plaintiff, the assured, had agreed to purchase oats, to be shipped for Portsmouth. Oats were shipped for Southampton by the seller, and offered to the plaintiff. He might have refused, that is to say, he had the option of refusing, the oats so shipped and so offered; but the vendor could not, it was held, after having appropriated the oats which were to be shipped for Portsmouth to the plaintiff's contract, withdraw such appropriation without the plaintiff's consent, on the ground that the oats were shipped for Southampton. The plaintiff insisted, until after the loss of the ship was suspected, and, as it would seem, had in fact occurred, on his right to a delivery at Portsmouth, but eventually waived that objection, and insisted, as against the

(1) 2 Bing. N. C. 761.

defendants, his underwriters, that the property in the cargo shipped for Southampton and appropriated to him by the vendors, was at his option, in him. This contention was held to be a valid one. "It was held," says Mr. Phillips, "that the underwriters could not object his want of interest because the oats had not been shipped to the place designated; for, *he had a right to accept them and to waive any objection on that account*": Phillips on Insurance, § 180. We, therefore, hold that the plaintiff had, in the present case, an insurable interest to its full value in the rice on board the *Sunbeam* when she was lost, on the ground that the property in such rice had vested in him before the loss. We think that the plaintiff had an option, which existed at the time of the loss, of rejecting the rice on the ground that a full cargo had not been shipped. But we are of opinion that the plaintiff was entitled, as against the defendant, to decline to exercise that option, and to insist that the contract of purchase and sale was fulfilled by the loading on behalf of the vendors on board the *Sunbeam* of the rice which was on board when the ship foundered; and that, consequently, the property in such rice was in him, the plaintiff, at the time of the loss.

We are further of opinion that, even if the property in the rice did not legally pass to the plaintiff, yet he had an insurable interest in it, because he had an existing contract with regard to it from the time of its being loaded on board, by virtue of which he had an expectancy of benefit and advantage arising out of or depending on the safe arrival of the rice.

As to the suggested reduction of damages, we are of opinion that the policy was a valued policy, the valuation being the amount of the proper invoice according to contract between the plaintiff and his vendors. That amount, according to the course of dealing between the plaintiff and his vendors, included the disputed 15 per cent.

On the whole, therefore, we are of opinion that the plaintiff was entitled to succeed, that the verdict was rightly entered, and that the rule should be discharged.

Rule discharged.

Attorneys for plaintiff: *Parker, Watney, & Co.*
Attorneys for defendant: *Hollams, Son, & Coward.*

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STRATTON AND OTHERS *v.* THE METROPOLITAN BOARD OF WORKS.

Poor Rate—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18) s. 133—*Deficiency in Assessments—Completion of Works—Arrears of Deficiency—Parties to Recover—Thames Embankment Act*, 1863 (26 & 27 *Vict. c.* 75.)

The defendants were authorized by the Thames Embankment Act, 1863, to construct an embankment on the south side of the Thames, in the parish of St. Mary, Lambeth, and also to make certain street improvements. For these purposes the Act empowered them to take lands, and incorporated the Lands Clauses Consolidation Act, 1845. The power of taking lands so given to them extended to more than was necessary for the mere purpose of the embankment and roadway of the streets; and they were empowered to take and let additional land for building purposes, and sell the ground rents for the purpose of recouping their outlay in making the improvements. The Act provided that when the roadway, new streets, and approaches were completed, of which completion a certificate signed by the chairman of the defendants' board, and delivered to the clerk of the peace, should be conclusive evidence, all the ground laid open into the same respectively should be deemed to form part thereof respectively, and be used by the public accordingly. The defendants took lands for the purposes of the Act, and the works were commenced in 1865. On the 11th of May, 1870, the certificate of completion required by the Act was given, but certain additional lands not required for the street improvements still remained in the hands of the defendants unbuilt upon, and were not rated to the poor-rate.

The 133rd section of the Lands Clauses Consolidation Act, 1845, provides that if the promoters of the undertaking become possessed by virtue of that Act, or the special Act, of lands liable to be assessed to the poor's rate, they shall from time to time until the works shall be completed and assessed to such poor's rate, be liable to make good the deficiency in the assessment for poor's rate, by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands with any building thereon were valued or rated at the time of the passing of the special Act, and on demand of such deficiency the promoters of the undertaking or their treasurer shall pay all such deficiencies to the collector of the said assessment.

The overseers of the parish of St. Mary, Lambeth, for the year 1871–1872, demanded of the defendants an aggregate sum representing deficiency of assessment for all the years from 1865 to 1871, no previous demand having been made of any deficiency. The poor-rate accounts of the parish had been duly audited for each of these years and were closed:—

Held, that the deficiency of assessment could only be recovered up to the date of the certificate, as the works were then complete within the meaning of s. 133, though land taken under the Act by the defendants still remained unbuilt upon. Secondly, that the fact that the works contemplated by the special Act were not such as would be assessable to poor's rates when completed, did not prevent the 133rd section from applying to lands taken for such works.

Thirdly, that the defendants were liable to make good all deficiencies caused by lands having been taken for the purposes of the Act, until the date of the certificate of completion of the works, but that as soon as any buildings were erected on any such lands and assessed, or became liable to be assessed, the rateable value of such buildings was to be credited against the deficiency; and fourthly, that the plaintiffs might enforce payment of the aggregate of the deficiencies arising for all the years from 1865 to 1870.

Some of the lands taken were at the passing of the special Act in the occupation of the commissioners of works for public purposes as servants of the Crown, and though in the valuation lists, had not, while in such occupation, been rated:—

Held, that the defendants were not liable to make good any deficiency in respect of such lands.

SPECIAL case, of which the facts were in substance as follows:

The plaintiffs were the churchwardens and overseers of the parish of St. Mary, Lambeth, for the year from Easter, 1871, to Easter, 1872.

The action was brought to recover 6319*l.* 17*s.* 9*d.*, the alleged deficiency in the poor rates of the parish as after mentioned.

By the Thames Embankment Act, 1863 (26 & 27 Vict. c. 75), the defendants were authorized to make an embankment of part of the river Thames, on the south side thereof, in the parish of St. Mary, Lambeth, and certain other works. The works, as authorized by the Act, included the construction of the embankments, the making of certain new streets, and the widening and improvement of certain old streets, and the reclamation of a portion of the foreshore of the Thames, and the necessary removal and destruction of existing property. The Act also directed the laying out of foot-ways and carriage-ways, and the 14th section provided that when the roadway, new streets, and approaches were completed, of which completion a certificate signed by the chairman of the board, and delivered to the clerk of the peace for the county of Surrey, should be for all purposes conclusive evidence, all the ground laid open into the same respectively should be deemed to form part thereof respectively, and might be used by the public accordingly, and thenceforth the said roadways, new streets, and approaches, with the sole power, authority, and duty of paving, &c., the same, and of rating hereditaments within the same respectively, should be under the care, &c., of the same vestries, &c., as the other streets in the parishes, &c., in which the same respectively were situate.

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The Act gave power to the defendants to take certain lands for the purposes of the Act, and incorporated the Lands Clauses Consolidation Act, 1845, with the exception of ss. 34, 92. (1)

It also incorporated ss. 27, 32 to 34, and 37, of the Embankment Act, 1862 (25 & 26 Vict. c. 93). By these sections it is provided that the board shall demise lands not wanted for the purposes of the Act on building leases, and sell the ground rents and reversions of such leases, applying the proceeds of such sales to the purposes of the Act.

By the Thames Embankment Act, 1864 (27 & 28 Vict. c. 135), the defendants were empowered to purchase additional lands and to make further improvements in the parish of St. Mary, Lambeth, for the purposes of the Thames Embankment Act, 1863, and the two Acts were to be considered as one Act.

In pursuance of the powers given to them, the defendants proceeded to construct the embankment, and other public works, and for that purpose took various lands in the parish of St. Mary, Lambeth. The works were commenced in 1865. On the 11th of May, 1870, the road and footways of the new streets were completed, and the following certificate was given as the certificate required by s. 14, before mentioned:—

"To the Clerk of the Peace of the County of Surrey: Pursuant to the 14th section of the Thames Embankment Act, 1863, I, Sir John Thwaites, Knight, Chairman of the Metropolitan Board of Works, do hereby certify that the roadway, new streets, and approaches respectively referred to in the said section of the above-mentioned Act, have been made and executed by the said

(1) Sect. 133 of the Lands Clauses Consolidation Act, 1845, enacts as follows: "If the promoters of the undertaking become possessed by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor's rate, they shall from time to time until the works shall be completed and assessed to such land tax or poor's rate, be liable to make good the deficiency in the several assessments for land tax and poor's rate, by reason of such lands having been taken or used for the purpose of the works, and such deficiency shall be computed according to the rental at which such lands with any building thereon were valued or rated at the time of the passing of the special Act, and on demand of such deficiency the promoters of the undertaking, or their treasurer, shall pay all such deficiencies to the collector of the said assessments respectively."

board, and are now completed. Dated this 11th day of May, 1870. Signed, J. Thwaites."

Due notice of the certificate was given to the clerk of the peace, as required by that section, and a duplicate was on the 12th of May, 1870, served on the vestry of the said parish. The embankment and works mentioned in the said Act, except as hereinafter mentioned, were at that time completed, and the roadways and footways of the streets were completed, but the land at the sides of the roadways and footways was not covered with houses, nor was it all let or disposed of by the defendants, but some of it still remained waste in their hands, unlet and undisposed of.

Since the works had been in progress, the defendants had not been called on to make any contribution to the poor's rate until the claim and demand next hereinafter mentioned. The first claim made on the defendants was in 1872, by a letter written under plaintiffs' direction by their clerk, and addressed to the defendants, in which were inclosed, first, a statement of deficiency, and, secondly, a written demand of payment of such deficiency.

The total deficiency claimed was the aggregate amount of the poor's rates from year to year, reckoned from the various dates in the years 1865 to 1869 inclusive, at which the lands were respectively taken by the defendants, up to Christmas, 1871. The said deficiency was computed according to the rental at which the lands with any buildings thereon were valued or rated at the time of the passing of the Thames Embankment Act, on the 20th of July, 1863.

The said deficiency and claim were in respect of all the lands taken by the defendants, and included an item of claim in respect of certain land which at the time of the passing of the Act of 1863 was in the occupation of Her Majesty's Commissioners of Works, for public purposes, as servants of the Crown, and which, although in the valuation lists, had not while in the occupation of the commissioners been assessed to the poor's rate, but had been so assessed before the commissioners came into occupation. The case then set out the lands in question, and the purposes to which they had been applied, as follows:—*a*. Public highways,

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being carriage roads and footways: land thrown into the river and being part of the river highway. *b.* Site of St. Thomas's Hospital, together with a triangular piece of vacant land, sold to and now the property of the hospital. *c.* Land inclosed and planted as ornamental gardens. *d.* Building land. *e.* Land sold to Messrs. Doulton and to James Stiff and conveyed to them respectively in 1868 and 1869 as part of the compensation payable to them under the Act. *f.* Land unappropriated.

The lands in classes *a*, *c*, *d*, and *f* had not been assessed at all since the commencement of the works: the lands in class *b* had been sold to the governors of St. Thomas's Hospital in November, 1863, and the hospital building was commenced in 1865, and completed in 1871, being upon such completion assessed to the poor's rate. The lands in class *e* had been assessed to the poor's rate since Messrs. Doulton and Stiff became occupiers thereof.

The accounts of the parish for the years 1865 to Easter, 1871, including the poor-rate accounts, had been duly audited by the poor-law auditor, and were in fact closed except so far as they might be deemed to be left open by the pending claim.

The questions for the Court were: 1, whether the defendants were liable at all to pay the deficiency, or any part thereof, in poor's rates on lands taken by them under the powers and for the purposes of the said Thames Embankment Acts; 2, 3, and 4, whether they were liable in respect of the various classes of land, *a*, *b*, *c*, *d*, *e*, *f*, and if so, up to what dates their liability continued in respect of the lands respectively; 5, whether the defendants were liable in respect of the lands occupied as before-mentioned by Her Majesty's Commissioners of Works: 6, whether the plaintiffs could legally demand and enforce payment, in a lump sum or otherwise, of the arrears of deficiency in the poor's rates for the several years before mentioned, viz. in the rates for the years 1865 to 1871 inclusive; and if they could legally demand and enforce payment of any of such deficiency, for and in respect of which of such rates they could do so.

Thesiger, Q.C. (with him *Meadows White*), for the plaintiffs. It is contended, first, that the "undertaking" and the "works," within the meaning of the 133rd section of the Lands Clauses

Consolidation Act, as incorporated by the Embankment Acts, are not confined to the mere construction of the embankment, streets, and roadways, including only such portions of them as were to be public. The undertaking included two objects, first, the construction of these, and secondly, the recouping of the promoters' outlay, through the taking by them of large quantities of land abutting upon the proposed street improvements which were to be built upon, and the sale of the ground rents: *Galloway v. Mayor of London.* (1) Inasmuch as for the latter object large quantities of land are taken not required for the actual street improvements, and assessable property destroyed, it may reasonably be considered to have been intended that the promoters should not be entitled to keep these pieces of land unbuilt upon without making up the deficiency in the assessment caused thereby. The works are not complete until the second object is attained as well as the first.

[LUSH, J. Could it be contended that the works of a railway company are not complete as long as any surplus land exists?]

The case is different. It is not assumed by the railway Acts that more land will as a rule be taken than is wanted, whereas here it is the very intention of the Act that additional land shall be taken for building purposes. He cited on this point, *Quinton* v. *Mayor of Bristol* (2); *Reg.* v. *Metropolitan District Ry. Co.* (3); *Whitechurch* v. *East London Ry. Co.* (4); *Wheeler* v. *Metropolitan Board of Works.* (5)

[KEATING, J. Your contention must be that as long as any portion of land within the parish is vacant the works are not completed. Is not the 14th section of the special Act conclusive against you?]

It must be admitted that it raises a strong argument against the plaintiffs' contention on this point, inasmuch as the terms of it exactly fit in with the specification of the works given by the Act itself.

[THE COURT intimated an opinion that the works were completed within the meaning of the section when the certificate of

(1) Law Rep. 1 H. L. 34.
(2) Law Rep. 17 Eq. 524.
(3) Law Rep. 6 Q. B. 698.
(4) Law Rep. 7 Ex. 248, 424; Law Rep. 7 H. L. 81.
(5) Law Rep. 4 Ex. 303.

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completion was given, and the learned counsel thereupon abandoned the point.]

Assuming that the date of the certificate is that of the completion of the works, it is contended that the plaintiffs are entitled to the deficiency up to that date on all the lands; it is immaterial that the lands may be destined to be so applied under the Act that they will not, when the works are completed, be rateable. [He cited on this point: *Mayor of London* v. *St. Andrew, Holborn* (1); *Wheeler* v. *Metropolitan Board of Works.* (2)]

Sir H. James, Q.C. (with him *R. S. Wright*), for the defendants. With respect to the land sold to the governors of St. Thomas's Hospital, it is submitted that the liability of the defendants ceased upon such sale; they were entitled by their Act to sell, and the land's remaining vacant afterwards was not occasioned by the taking of the land for the purpose of defendants' works, but by the act of the vendees. If the governors of St. Thomas's had chosen to build on the land immediately, there might have been no deficiency. Can the defendants be liable according as their vendees choose to build on the land sooner or later?

With respect to the land ultimately to be appropriated to public road and footways and other public purposes, it is contended that the 133rd section does not apply. That section contemplates only lands taken for such works as will ultimately be rateable when completed. Why should the land be rateable while the works are in progress, if it will not be so when they are completed?

[KEATING, J. Your contention is, that the more the ratepayers of the parish will ultimately be injured, the more they are to suffer in the meanwhile. Why should not the period of loss to the parish be postponed till the completion of the works?

LUSH, J. Your contention would appear to deprive the section of all application. If none of the works authorized by the special Act are assessable, and the section only applies to assessable works, the section can have no meaning as applied to the Embankment Acts, though incorporated into them.]

It is contended that there was no deficiency, in point of fact, which the plaintiffs are entitled to recover. The claim is in respect of the period from 1865, and until the year 1872 no

(1) Law Rep. 2 C. P. 574. (2) Law Rep. 4 Ex. 303.

demand was ever made on the defendants. The deficiency on each rate ought from time to time to have been claimed. If the expenses of each year were actually provided for, notwithstanding the diminution of rateable property, by raising a larger rate on the remainder of the ratepayers, there was not actually any deficiency. The accounts for each of those years were closed, and there is no object to which the sum sought to be recovered can be legally applied. The sum recovered as the deficiency ought to have been from time to time applied in relief of the existing ratepayers; it is sought now to apply it in relief of persons not entitled to such relief. This is contrary to the principles of law on which retrospective rating is forbidden. Both the persons who will in truth have to bear the burthen and those who will reap the benefit will not be the same as if the deficiency had been claimed when it should have been. It was intended that the ratepayers of each year should receive the benefit of the deficiency recoverable for the year. It is contended that an annual demand is a condition precedent to the arising of the liability to pay the deficiency. [He cited on this point *Reg.* v. *Chiddingstone* (1); *Harrison* v. *Stickney* (2); *Reg.* v. *Wigan* (3); *Rex* v. *Goodcheap* (4); *Bradford Union* v. *Clerk of the Peace for Wilts.* (5)]

It is further contended that the plaintiffs, as the overseers for one year only, are not entitled to recover the aggregate of the deficiency for all the years. They are not a corporation, and the debts of previous years will not be transferred to them.

Meadows White, in reply. The term "deficiency" does not refer to the amount collected, it refers to the assessment of the rateable value. The deficiency of assessment exists, though by raising the rate on the remaining hereditaments the requisite sum be obtained. It may be, that in the years in question too large a rate was levied on the remaining hereditaments, but that does not prove that there was no deficiency in the assessment. The plaintiffs are entitled to recover the whole of the arrears; all the objections urged against their doing so apply to any case where

(1) 2 B. & S. 294; 31 L. J. (M.C.) 121.
(2) 2 H. L. C. 108.
(3) Law Rep. 9 Q. B. 317.
(4) 6 T. R. 159.
(5) Law Rep. 3 Q. B. 604.

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the rate is made the subject of protracted litigation. When ultimately recovered and paid, it may be years after the period of its originally being due. It has always been held that the overseers of one year can recover the arrears of rates of previous years. The right to recover the deficiency does not arise until demand is made of it.

Cur. adv. vult.

Nov. 25. The judgment of the Court (Keating, Lush, and Denman, JJ.) was delivered by

DENMAN, J. The questions submitted to us in this special case, which was argued on the 13th instant by Mr. Thesiger for the plaintiffs and Sir Henry James for the defendants, are,—first, whether the defendants are liable at all to pay the deficiency or any part thereof in poor-rates on lands taken by them under the powers and for the purposes of the Thames Embankment Acts, and,—secondly, if so, whether the plaintiffs can legally demand and enforce payment in a *lump sum* or otherwise of the arrears of deficiency in the poor-rates for the years 1865 to 1871 inclusive, and, if they can legally demand and enforce payment of any such deficiency, for and in respect of which of such rates can they do so?

There are several subordinate questions having reference to particular classes of property, which we are requested to answer, in order that the amount payable, if any, may be precisely ascertained.

The Embankment Act, 1863, is the one which authorized the works in question; and the 15th section of that Act incorporates the whole of the Lands Clauses Consolidation Act, 1845, with the exception of ss. 34 and 92, relating to the costs of arbitrations and to the taking of parts of buildings, and to matters connected therewith respectively.

The 133rd section of that Act, therefore, is incorporated and must be read as part of the Embankment Act; and it is upon the true construction of that section, as applied to the facts stated in the special case, that the liability of the defendants depends.

That section enacts that, "if the board" (who by the 1st section

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of the Thames Embankment Act, 1862, are to be taken as intended by the words "promoters of the undertaking") "become possessed by virtue of the special Act of any lands charged with the land-tax, or liable to be assessed to the poor-rate, they shall from time to time until the works shall be completed and assessed to such land-tax or poor-rate, be liable to make good the deficiency in the several assessments for land-tax and poor-rate by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act; and, on demand of such deficiency, the promoters of the undertaking or their treasurer shall pay all such deficiencies to the collector of the said assessments respectively.

It was contended on behalf of the defendants, that, as this clause contemplates a time when the works authorized to be done shall become assessable to the poor-rate, it cannot apply to the streets and public places to be made by the board, and therefore that they are not liable to pay in respect of property which stood upon the sites of such streets and places, seeing that these can never become assessable to the poor-rate: and some observations of Baron Bramwell in *Wheeler* v. *Metropolitan Board of Works* (1) were quoted in support of the argument. In that case, however, the Court did not think it necessary to decide the point; and, although the learned Baron, in the course of his judgment, spoke of it as one of difficulty, his opinion on the whole appears to have inclined to an opposite conclusion. In the case before us, however, it is necessary to decide the question. We have fully considered the language of the clause, and are satisfied that such is not its meaning.

Pushed to its legitimate conclusion, the argument would go to neutralize the section altogether in its relation to the present case; for, the works enumerated in the 1st section which it was the purpose of the Act to accomplish are all of them public ways and places which never can become assessable to the poor-rate. Only such pieces of land as may happen to be taken and not to be required for these public purposes will ever become assessable

(1) Law Rep. 4 Ex. 303.

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to the poor-rate; and these are not the "works" authorized to be done.

The clause is imported from an Act which was framed for railways, canals, and other undertakings which, though of a public nature, would, when completed, become rateable subjects. If it had been drawn expressly for insertion in this Act, it would no doubt have been differently worded. But, as it is incorporated and made part of this Act, we must adapt its language to the subject-matter, and give it the effect of which it is fairly capable. The words "until the works shall be completed and assessed to the poor-rate" mark the period during which compensation shall be paid to the parish, not the measure of that compensation; the event upon which the liability is to end, not the extent of liability. That is defined in the other parts of the section, and is measured by the "lands assessed to the poor-rates and taken for the purposes of the Act." Whatever those lands paid or would have paid the board are to pay until "the works are completed." If the words "and assessed to the poor-rate" are to be read as inseparable from the others, the two together constitute the condition, whatever the nature of the "works" may be; it follows either that the clause in this Act is inoperative or the liability of the board will continue for ever. That was certainly not the intention of the legislature. Giving the clause the widest sense it can have in its application to the purposes of this Act, it cannot mean more than that the board shall make good the loss to the parish until the "works," that is, the embankment and streets authorized to be made, are completed, and the land not required for public purposes, if assessable, is assessed to the poor-rate. This, we think, is the construction to be put upon the section. That event happened when the certificate mentioned in the case was given on the 11th of May, 1870; and from that period the liability of the board ceased. Whatever land then remained unappropriated which had any rateable value became assessable to the poor-rate.

It was further contended that, as the parish accounts had been duly audited from year to year, and closed, "except so far as they may be deemed to be kept open by the pending claim," the overseers must have rated the remainder of the parish at a higher rate, and so have obtained sufficient for their purposes without the aid

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of this clause, and therefore that there was no "deficiency" in the assessments.

This objection, which is extremely ingenious, besides that it assumes what certainly is not explicitly stated nor necessarily to be implied from the language of the 19th paragraph, supposes that the word "deficiency" means simply that sum, if any, which shall be found wanting to make up the amount required by the parish. But we are satisfied that this is not the true meaning of the clause. It may be that the overseers ought not to have increased the amount of the rate so as to surcharge the other rate-payers, by reason of the buildings taken by the board being withdrawn from the assessment. We do not know that they have done so: but, even supposing they have, that does not relieve the board from their liability. What the clause means is, that the board shall stand in the place of the occupiers of the demolished houses, and pay what they would have paid upon each assessment if the houses had not been taken, and they had continued assessed at the rateable value which they bore in the assessment at the time the Act passed.

The amount payable by the board is therefore what the parish lost upon each assessment. The period during which they are to make this compensation to the parish is, until the works shall be completed.

Another objection which was much pressed by Sir Henry James was, that the board are discharged from liability by reason of the deficiency not having been demanded from time to time as the rates were made and collected; and that when the time for collecting the rate was passed, the liability was extinguished. This objection was enforced by arguments founded both upon the wording of the clause and upon considerations based upon the acknowledged principle of rating. It was argued that, as the parishioners are a fluctuating body, the payment now of deficiencies of bygone years cannot be applied in relief of the ratepayers for the time being, as the statute intended it should be; and, on the other hand, that the board, if it had been called on year by year as the rates were made to pay the deficiency in the rate, would have been able to collect the amount from the ratepayers for the time being, and that they cannot now pay it without a retrospective rate, which the law does not allow; and that, in short, by reason of the lapse of time, the

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real debtors cannot be got to pay, nor the real creditors to receive; and that the words of the section must receive such a construction as will carry out this fundamental principle of rating.

We were much impressed at the time with the arguments on this branch of the case. But, upon consideration, they appear to us to be more specious than sound. The principle of rating relied upon, viz. that those who incur the debt shall pay, and those who are entitled to the relief shall receive it, is necessarily elastic, and one which cannot be rigidly applied. Every rate is made upon an estimate of what it may be reasonably expected to produce, allowance being made for probable defaulters; and in most cases where the rates fall in arrear for any considerable time and are afterwards recovered, some will have paid more than their due share and some are relieved at the expense of others who have suffered. And, when a parish is required to pay a bygone debt, which may be the case now within a given limit (see 22 & 23 Vict. c. 49), some are called on to contribute for a debt which should have been paid by their predecessors. It is impossible so to adjust a system of rating as that none shall pay or receive more than is strictly their due. We, therefore, must fall back upon the words of the Act, and, construing them in their ordinary sense, ascertain what the intention of the legislature was, and not strain them in order to prevent a speculative hardship.

The Act says the board "shall from time to time be liable to make good the deficiency," and shall pay all such deficiencies on demand. The liability, by the express terms of the clause, accrues from time to time as the rates are made; the payment is to be made on demand. Do the words "on demand" qualify the liability, or do they point to the time of payment? Do they import a condition, or a duty? The argument requires us to read the words "on demand" as if they were, "provided the deficiency be demanded," that is, as words of condition, instead of words of obligation. This is not the natural, ordinary meaning of the words; and we cannot see any sufficient reason for construing them in any other sense.

We conclude, therefore, that the liability of the board was not extinguished by the delay in demanding payment, and that the arrears of all deficiencies down to the date of the certificate (the 11th of May, 1870), may legally be demanded in a lump sum.

We have dealt with the argument as it was presented to us, upon the supposition that the board would have to pay the arrears out of the rates; and we desire to add, in order to avoid misapprehension, that, if we had thought there was any validity in the argument, we should nevertheless have felt ourselves bound to give judgment for the plaintiffs, and have left that question, viz. the ability of the board to pay or raise the money by legal means, to be decided when steps were taken to enforce payment. But, in truth, the assumption is founded on a mistake. The embankment works are not paid for out of rates, but out of a special fund provided for the purpose.

The last objection was, that the overseers of each year in which the deficiency accrued are the proper parties to sue, and that the overseers of 1871-2 are not the persons entitled to recover. Whether any such objection would have availed in an action, it is not necessary to decide,—the question proposed to us being, whether the defendants are liable to pay and whether the plaintiffs are entitled to demand and enforce payment in a lump sum of the arrears. We are of opinion that the plaintiffs are the only persons who were when the demand was made entitled to receive the money and to enforce payment; whether by order, mandamus, or in any other form of proceeding, we need not consider.

The answers to the second, third, and fourth questions follow from what we have said. The amount payable by the board is the aggregate of the rates which would have been payable from time to time in respect of the property taken, if the property had remained as it was at the time of passing the Act: but, as soon as any new buildings were erected and assessed, or become liable to be assessed, the rateable value of such new buildings should be credited against this sum.

And, in answer to the fifth question, we are of opinion that, as no rates were at the passing of the Act paid in respect of the property occupied by the commissioners of works, the board are not liable for the rateable value of that property.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *J. & C. Rogers & Sons.*
Attorney for the Board: *W. Wyke Smith.*

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FOWLER *v.* LOCK.

Cab Proprietor and Driver—Bailment—Warranty of Fitness of Horse to be driven in a Cab.

7 QBD 662

The plaintiff, a cab-driver, obtained from the defendant, a cab-proprietor, a horse and cab upon the usual terms, viz. that the driver on bringing them back at the end of the day should hand over to the proprietor 18*s.*, retaining for himself all the day's earnings over that sum,—the day's food for the horse being supplied by the owner, and the latter having no control over the driver after leaving the yard. The horse with which the plaintiff was furnished, which was fresh from the country and had never before been harnessed to a cab, overturned the cab and injured the driver.

In answer to questions put to them by the judge, the jury found that the horse was not reasonably fit to be driven in a cab; that the plaintiff did not take upon himself the risk of its being reasonably fit to be so driven; that the defendant did not take reasonable precautions to supply the plaintiff with a reasonably fit horse; and that the horse and cab were intrusted to the plaintiff as bailee, and not as servant.

A verdict having been thereupon entered for the plaintiff,—

The Court refused to disturb it.

THIS was an action by a cab-driver against a cab-proprietor to recover damages for injuries sustained by the plaintiff by reason of his having been supplied with an untried and vicious horse.

The cause was first tried before Byles, J., at the sittings in London after Michaelmas Term, 1871, when a verdict was found for the plaintiff with 50*l.* damages. In the ensuing term, a rule nisi was obtained to enter a verdict for the defendant on the ground that the plaintiff was the servant of the defendant, and not a bailee; and that, if a bailee for hire, there was no implied promise that the horse was reasonably fit for the purpose for which it was let; or for a new trial, on the ground that the verdict was against the weight of evidence. This rule was argued in Easter Term, 1872, when the verdict was upheld by Byles and Grove, JJ. (Willes, J., dissenting), on the ground that the relation between the defendant and the plaintiff was not that of master and servant, but that of bailor and bailee, and consequently that the defendant was under a legal obligation to furnish the plaintiff with a horse that was reasonably fit to be driven in a cab: see *Fowler* v. *Lock.* (1)

(1) Law Rep. 7 C. P. 272.

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The defendant appealed against this decision, and the Court of Error, being divided in opinion, upon the imperfect statement before them, as to whether the horse and cab were intrusted to the plaintiff as servant or as bailee, and those of the judges who inclined to the latter opinion not being satisfied that it followed necessarily that there was a warranty that the horse bailed was fit for the purpose for which it was bailed, and that it might be that the plaintiff took upon himself the risk of its fitness, awarded a venire de novo. (1)

The cause again came on for trial before Denman, J., at the sittings in London after Trinity Term last. The facts proved were substantially the same as upon the former occasion. The learned judge left the following questions to the jury :—

1. Was the horse reasonably fit to be driven in a Hansom cab ?

2. Did the defendant take reasonable precautions to supply the plaintiff with a reasonably fit horse upon the occasion in question ?

3. Did the plaintiff take upon himself the risk of the horse being reasonably fit to be driven in a cab ?

4. At the time of the accident, did the plaintiff take the horse and cab wrongfully, or were they entrusted to him by the defendant ?

5. Were the horse and cab intrusted to the plaintiff as bailee, or as servant ?

The jury answered the first three questions in the negative. In answer to the fourth, they found that the cab and horse were intrusted to the plaintiff by the defendant; and in answer to the fifth they found that they were intrusted to him as bailee, and not as servant.

Upon these findings the learned judge directed a verdict to be entered for the plaintiff; and the jury assessed the damages at 50*l*.

Francis moved, pursuant to leave, to enter a verdict for the defendant, or a nonsuit, or for a new trial on the ground that the verdict was against the weight of evidence.

[DENMAN, J. By agreement at the trial the findings of the jury

(1) Law Rep. 9 C. P. 751, n.

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were not to prejudice the finding of the Court as to the relation of the parties.]

That is raised as a question of law for the Court. For the purpose of this motion it must be treated as a misdirection. The second question presented an immaterial issue. To render the defendant liable, there must be something amounting to knowledge in him of the vicious character of the animal; and that was negatived on both trials.

LORD COLERIDGE, C.J. The answer of the jury to the second question virtually amounts to a finding of personal negligence on the part of the defendant; and, as there was evidence to support that finding, and the learned judge is not dissatisfied with the verdict, there will be no rule.

KEATING, J. The second finding clearly amounts to a finding of personal negligence.

BRETT and GROVE, JJ., concurred.

Rule refused.

Attorney for defendant: *W. H. Orchard.*

Nov. 6.

STRACHEY *v.* LORD OSBORNE.

Costs—Certificate under 30 & 31 *Vict.* c. 142, *s.* 5—*Review of Judge's Discretion.*

In dealing with s. 5 of the County Courts Amendment Act, 30 & 31 Vict. c. 142, the question is not simply whether the action should have been brought in the superior Court; but the judge is justified in declining to certify for costs, if he is reasonably satisfied that the action should not have been brought at all.

His discretion in this respect is open to review.

Where, therefore, the judge, although a substantial claim of right was put in issue by the pleadings and contested at the trial, refused to certify for costs under that section, because he thought that the action was not bonâ fide brought to try the right, but merely to gratify an angry feeling against the defendant, the Court,—Denman, J., doubting,—declined to interfere, not being satisfied that the judge's discretion had been wrongly exercised.

Hinde v. *Sheppard* (Law Rep. 7 Ex. 21) observed upon.

THE plaintiff was lord of the manor of Great Eden, in the

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county of Somerset. The defendant was the rector of the parish church.

The declaration charged the defendant with, amongst other things, breaking and entering a close of the plaintiff called the Green, digging up and destroying the turf thereof, and destroying and carrying away a stone seat.

The defendant pleaded twenty pleas; amongst others, that the locus in quo was not the soil of the plaintiff, that it was the soil and freehold of the defendant, leave and licence, and pleas claiming respectively a prescriptive right of way for twenty, thirty, and forty years.

In consequence of these pleas it became necessary for the plaintiff to prove his title to the manor, and for the jury to have a view.

The trial, which took place before Brett, J., and a special jury, at the last Somerset assizes, lasted two whole days; and in the result the plaintiff obtained a verdict on several of the issues, the jury assessing the damages at 50*s.*, avowedly as the cost of replacing the stone seat on the village green.

The plaintiff admitted that the rector had a right of way to his house over the village green, but contested his right to make a stone road, as claimed by the defendant.

The judge was asked to certify for costs under 30 & 31 Vict. c. 142, s. 5 (1), but he refused to do so.

Cole, Q.C., moved for an order for costs under the statute, notwithstanding the refusal of the judge to grant a certificate. He submitted that the action having been brought, not for the purpose of recovering damages, but to try a right which was disputed by the defendant, the case was clearly not of that frivolous nature which the legislature intended to discourage, nor one which could have been tried in a county court. He referred to *Hatch* v. *Lewis* (2) to shew that it is competent to the Court or a judge at chambers to grant costs under this statute, although the presiding judge has declined to certify; and also to *Hinde* v. *Sheppard* (3); and he read a long correspondence which had taken place between the parties and their respective attorneys before the commencement of

(1) See the section, ante p. 34, n. (1).

(2) 7 H. & N. 367; 31 L. J. (Ex.) 26. (3) Law Rep. 7 Ex. 21.

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the action, which shewed that the defendant throughout was disputing the plaintiff's right to the village green.

[BRETT, J. The result shewed that the plaintiff had no right to bring the action except in respect of the stone seat. The action was evidently the result of angry feeling. I therefore thought it was not a case in which I could certify that there was sufficient reason for bringing the action in a superior Court.]

It is not a case for a county court, where there can be neither special jury nor view: and, if the action had been brought in the inferior court, the defendant would have removed it. The consequence of refusing this application will be, that, although the plaintiff will get no costs, the defendant will have the costs of the issues found for him.

LORD COLERIDGE, C.J. I am of opinion that there should be no rule. The application is under s. 5 of 30 & 31 Vict. c. 142, which enacts that, "if in any action commenced after the passing of the Act in any of the superior Courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs." The 30 & 31 Vict. c. 142 is the last Act dealing with this matter; and it comes as a continuation of two or three Acts, in one of which the language was not quite the same. I pronounce my opinion upon the words of s. 5 alone. There may be ground for saying that, where the state of facts is such as to bring the case, not within this section, but within the enactment in 15 & 16 Vict. c. 54, s. 4, the discretion of the judge is taken away. But that is not this case. The section upon which this application is grounded expressly casts it upon the judge who presides at the trial to certify or not that there was sufficient reason for bringing the action in the superior Court. The judge here has refused to certify. It might be enough to say, holding as I do that the discretion should be absolute, that I cannot see that the discretion in this case was wrongly exercised. But the Courts

have taken upon themselves upon fresh materials to review the judge's discretion, and in some instances to come to a different conclusion. I do not venture to question the power of the Courts to do this: but I think it should be a very strong case to induce them to interfere. Upon the facts of this case, I have no hesitation in saying that my Brother Brett exercised his discretion in a satisfactory manner, and as I should have been disposed to exercise it myself; and I see no reason for saying that he was wrong in thinking that there was no justifiable reason for bringing the action at all. Both parties appeared to have been in the wrong. The plaintiff had, as my Brother Brett reports to us, shut up a way of access to the rectory house which appeared to have existed for forty or fifty years, and brought this action against the rector for making, or rather for restoring, a way across the village green. I cannot see that the action was in any fair sense of the word brought to try a right; but, on the contrary, it seems to have been brought merely to gratify spite and anger. If that be so, it clearly was not a case for a certificate. *Hinde* v. *Sheppard* (1) is an authority for saying, not only that the Court may, but that they ought to review the discretion of the judge if satisfied that he has exercised it erroneously. There, a right to land was in issue. Mr. Justice Willes refused to certify at the trial; and a judge at chambers also refused under the latter part of this section to make an order for costs. The Court of Exchequer were divided on the question. The Lord Chief Baron and Barons Bramwell and Channell were in favour of a review of the judge's discretion. Baron Cleasby, not differing from the rest of the Court, thought the plaintiff ought not to be allowed to question the jurisdiction of the judge, save under very exceptional circumstances. If that case be taken as deciding that, where a title or right comes in issue, the presiding judge is *bound* to certify, as the language of Mr. Baron Bramwell might seem to import, it is a pity that the legislature should have passed two or three Acts to so little purpose, seeing that some right is nearly always in issue. The section in question, as it seems to me, implies a discretion in the judge to grant or withhold his certificate according to the impression made upon his mind by the facts appearing before

(1) Law Rep. 7 Ex. 21.

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him. The Lord Chief Baron, in *Hinde* v. *Sheppard* (1), though he differed from the exercise of discretion by Willes, J., and overruled it, does not in his judgment in reality go further than the Courts had gone before; and it is clearly too late now to dispute their right to do so. All that that case must be taken to decide, is, that, in certain cases, the Court will overrule the discretion of the judge. It decides no principle; but merely that the judge was wrong in that case, which in this case I do not think he was. There was an earlier case of *Taylor* v. *Crowland Gas Co.* (2), where Parke, B., said that "the plaintiff ought to lay sufficient ground for the exercise of that jurisdiction." In the case of *Hatch* v. *Lewis* (3), it was held that, where a plaintiff in an action in a superior Court recovered a sum not exceeding 20*l.* in contract or 5*l.* in tort, and the judge who tried the cause refused to certify under 13 & 14 Vict. c. 61, s. 12, that it appeared to him at the trial that there was a sufficient reason for bringing the action in the Court in which it was brought, the Court would not, upon facts substantially the same as those before the judge, exercise the power conferred on them by 15 & 16 Vict. c. 54, s. 4, to order that the plaintiff recover costs. Bramwell, B., there said (4): "It seems to me that, although the legislature has given us the power, it never could have been intended that we should exercise it on the same materials as those before the judge at Nisi Prius. I will not say that the matter is altogether one of discretion; but it is undoubtedly one of opinion, no rule being laid down by which the judge at Nisi Prius is to be guided in saying whether there is sufficient reason for bringing the action in the superior Court. It never could have been intended that there should be an appeal from the judge who had the best opportunity of seeing, and being the most competent person to decide, whether the action was fit to be brought in a superior Court." Then, in *Hinde* v. *Sheppard* (1), the same learned judge said: "I do not wish to recall anything I said in *Hatch* v. *Lewis*. (3) That was an action brought only to recover damages and in such cases it is for the judge at Nisi Prius to decide as to

(1) Law Rep. 7 Ex. 21.
(2) 11 Ex. 1; 24 L. J. (Ex.) 233.
(3) 7 H. & N. 367; 31 L. J. (Ex.) 26.
(4) 7 H. & N. at p. 376.

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the propriety of certifying for costs. But here a right is in question, which would have little or no bearing on the amount of damages; and, there being sufficient cause for bringing the action in this Court, the plaintiff is entitled to his costs." And Cleasby, B., said: "If I had to decide this case unbiassed by the opinions of my Lord and my learned Brothers, I should have thought we ought not to interfere with the decision of the judge at Nisi Prius. If the judge is applied to at the trial to certify, he has a general jurisdiction over the costs; and, when he has refused the application, I think the Court ought not, without very strong and convincing reasons, to review his decision." If it was intended to lay it down in that case that the Court has no discretion, I do not think the decision correct, because undoubtedly the whole current of the cases points the other way. But, both upon the words of the Act and upon the authorities, and because I entirely concur in the view taken by my Brother Brett, I think this rule should be refused.

KEATING, J. Mr. Cole in this case asks us to review the discretion of my Brother Brett in refusing to certify under 30 & 31 Vict. c. 142, s. 5, that there was sufficient reason for bringing the action in the superior Court, so as to give the plaintiff his costs. The action was brought for a trespass in breaking and entering the plaintiff's close, part of the manor of Great Eden, and, amongst other things, destroying a stone seat on the village green. There were pleas, undoubtedly, which put in issue the title of the plaintiff; and at the trial objections were made that the plaintiff's claim to the soil and freehold was not proved. The case went to the jury, who found all the issues as to title for the plaintiff, but against him on an issue raised as to the right of the defendant to do certain acts on the soil of the manor in the way of making a road to his rectory house. I think the correspondence which Mr. Cole has referred to fully justifies him in contending that the right of the plaintiff to the green was contested by the defendant before the bringing of the action as well as at the trial. But there were other circumstances in the case which must not be lost sight of. It appeared that the parties were on very bad terms with each other. There was much heat and anger on both sides. And, notwithstand-

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ing that there were pleas put upon the record which raised an important question of title, the surrounding circumstances induced my Brother Brett to come to the conclusion that there was no sufficient reason for bringing the action in the superior Court. In other words, that the object was, not to try a question of title, but merely to indulge a hostile feeling in which both parties appeared to have participated. Had the point not been already decided, I think it might well have been questioned whether the statute did not intend the discretion of the judge to be final. It altogether deprives the plaintiff of costs where he shall not recover a certain amount of damages. In order to give the plaintiff costs, the judge must certify affirmatively "that there was sufficient reason for bringing the action in the superior Court." I cannot help thinking that the intention of the legislature was, that, except upon additional materials, the decision of the judge should be final. At all events, I agree with my Lord, that, although we have the power to review the discretion of the judge, very strong grounds should be laid to induce us to do so: and though, upon the facts brought before me, I must say I am not quite satisfied that I should have myself withheld a certificate, I cannot go so far as to say that my Brother Brett, with all his knowledge of the case, came to a wrong conclusion. I think we ought to be very cautious in interfering, without more materials to guide us. I think the rule should be refused.

DENMAN, J. Here, as in *Hinde* v. *Sheppard* (1), the application does not come before us strictly in the shape of an appeal from the learned judge who presided at the trial; but it is an application to the Court for a rule under the latter branch of s. 5 of 30 & 31 Vict. c. 142. In substance, however, it amounts to an appeal, inasmuch as no fresh materials are brought before us. The difficulty I feel in refusing this rule is not any doubt I entertain as to the right of the judge to exercise his discretion, as it is called; but my difficulty is whether, where a valuable and substantial right is in issue, as in *Hinde* v. *Sheppard* (1), the judge is not *bound* to exercise his discretion by certifying for costs. That case is not quite satisfactory to my mind. Mr. Justice Willes, who was as

(1) Law Rep. 7 Ex. 21.

conversant with the Common Law Procedure Acts and the County Court Acts as any judge who ever sat on the bench, refused to certify in that case, which was as clear an expression of opinion as could be that there was no sufficient reason for bringing that action in the superior Court. The judgment of the Lord Chief Baron does not put it on the ground, as my Brother Bramwell's words seem to put it, that, wherever a substantial and valuable right is in issue, the judge ought to certify: but he says that, where there is a bonâ fide intention to try an important right, the action is one which may properly be brought in a superior Court. Bramwell, B., seems to think the judge's discretion is limited where a substantial right is in issue. I must own that I should have preferred that the rule should go, in order that the decision in *Hinde* v. *Sheppard* (1) might be reconsidered, and the true rule laid down. But I do not feel sufficient confidence in the correctness of my own view as to what was intended to be laid down in that case, to induce me to dissent from the conclusion at which my Lord and my two learned Brothers have arrived.

BRETT, J. At the trial I was asked to certify to give the plaintiff his costs. I refused to do so. This application is now made to the Court for a rule to the same effect, without any fresh materials. It is impossible for the Court to grant such a rule unless they are prepared to say that I was wrong in refusing to certify. To say that this is not an appeal from my decision, is a mere play upon words. That the Court has power to review the discretion of the judge, I think it unnecessary to discuss. I assume the effect of the decisions to be that the Court may examine, and, if satisfied that the judge was wrong, make an adverse order. Had it not been for those decisions, I should certainly have thought that the intention of the legislature was that the discretion of the judge should not be the subject of review. The words of the section are very strong and precise. I should have thought that their meaning was, that the plaintiff may apply to the judge at the trial for a certificate; or, if he omits to do so, he may afterwards apply to a judge for an order or to the Court for a rule, and

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that the judge or the Court may in the exercise of his or their discretion allow costs; or, if there be any new materials, such application may be made notwithstanding the refusal of the presiding judge to certify. Upon the authorities as they stand, the question now is, whether or not I was right, upon the construction of the Act, and upon the facts, in refusing my certificate. The words are, that, if the plaintiff fails to recover a given sum, "he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing the action in a superior Court," or unless the Court or a judge at chambers shall by rule or order allow such costs. The argument of Mr. Cole supposes that, if a right is in issue, the judge is bound to assume that the action is bonâ fide brought to try such right. I see nothing in the words of the section to make it necessarily follow that the judge must certify in such a case. There may be rights which may very fitly be tried in the county court. If the decision in *Hinde* v. *Sheppard* (1) is to be taken to be, that, on shewing that a right or title is in issue, the judge *must* certify, I think it is a wrong decision. Here, it is obvious that a right was in dispute at the trial. What I had to determine was, whether the action was really brought to try the title, or for some other purpose. If I had thought that the plaintiff had really brought the action in order to sustain his right to the village green, I should have felt bound to certify for costs. But I could come to no other conclusion upon the facts which appeared before me, than that there was no sufficient reason for bringing the action in the superior Court. I was satisfied that the plaintiff did not bring or maintain the action to support his claim to the green. The claim set up by the defendant to the village green as part of the glebe was not material. The defendant clearly had not a shadow of interest in the soil of the green. In truth, the action was neither brought nor maintained for the purpose of trying the plaintiff's right to the manor, or the right to the green, but to prevent the rector from having a convenient road to the rectory, and putting him in an ignominious position with regard to his parishioners. It was, therefore, impossible for me to certify under s. 5 of 30 & 31

(1) Law Rep. 7 Ex. 21.

Vict. c. 142, that there was sufficient reason for bringing the action in this Court, nor that it was brought to try a right. It was, in truth, brought to deprive the defendant, as the verdict of the jury has established, of a right of way across the village-green to the rectory house. The origin of the disputes between the parties was that an arrangement which they had entered into for the exchange of some lands had been set aside by the ecclesiastical commissioners; and the plaintiff chose to think that they had been influenced in their conduct by the defendant, and so took away from him a right of way which he had long enjoyed. He did this because he was angry. The defendant, whose conduct I neither justify nor admire, was as angry as the plaintiff was; and acts of the most contemptible kind on the part of both ensued. The Act of Parliament is pointed wholly to the plaintiff's case. It was clear before and at and to the end of the trial that the defendant had no case as to the manor; and his claim to the green as part of the glebe was perfectly idle. I entirely agree with my Lord and my two learned Brothers, that, although the Court may have power to review the discretion of the judge under this statute, they ought not to interfere unless it be perfectly clear that he is wrong. If I had had any doubt, I should readily have agreed to a rule: but I was and still am of opinion that the action was one which ought not to have been brought in any Court.

Rule refused.

Attorneys for plaintiff: *Prior, Bigg, Church, & Adams.*

1874
Nov. 13.

STANLEY *v.* DOWDESWELL.

Agreement—What a sufficient Acceptance of an Offer.

The agents of A., who had a lease of premises, No. 22, Belgrave Road, to dispose of, wrote to B. as follows:—

"We have been requested by Mrs. D. to find her a lodging-house in this neighbourhood; and we forward for your approval particulars of two which we think most likely to suit."

Inclosed were particulars of two houses, one of which was No. 22, Belgrave Road, the terms for which were stated to be:—Premium, 250 guineas; rent, 80*l.*; and certain fixtures and planned furniture to be taken at a valuation.

B. replied as follows:—"I have decided on taking No. 22, Belgrave Road, and have spoken to my agent, Mr. C., of, &c., who will arrange matters with you if you will put yourselves in communication with him. I leave town this afternoon; so, if you have occasion to write to me, please address to Cirencester:"—

Held, that these two letters did not constitute a complete agreement binding on ~~the defendant.~~ B

THE declaration stated that the plaintiff was possessed of the lease of a house for the term of twenty-one years from the 25th of January, 1868; and that it was agreed between the plaintiff and the defendant that the plaintiff should grant to the defendant and the defendant should accept from the plaintiff an assignment of the said lease for the residue then unexpired of the said term of twenty-one years, for the price or sum of 262*l.* 10*s.* to be paid by the defendant to the plaintiff, and upon certain other terms then agreed upon between them: Averment, that all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to have the said agreement performed by the defendant: Breach, that the defendant refused to accept an assignment of the said lease from the plaintiff, or to pay to the plaintiff the said sum of 262*l.* 10*s.*, whereby the plaintiff was put to great loss and incurred costs and expenses in preparing the said assignment and in taking and preparing another house for the occupation of himself and family: Claim, 500*l.*

Pleas denying the agreement and the breach. Issues thereon.

At the trial before Grove, J., at the second sitting at Westminster in this Term, it appeared that the plaintiff, being possessed of the lease of a house, No. 22, Belgrave Road, and wishing to

dispose of it, placed it in the hands of Messrs. Davies & Francis, house-agents, to whom he communicated the terms upon which he was willing to part with it, viz. a premium of 250 guineas, certain tenant's fixtures, planned furniture, &c. to be taken to by valuation in the usual way, and rent 80*l.* per annum.

On the 11th of November last, a lady calling herself Mrs. Dowdeswell called at the office of Messrs. Davies & Francis, and obtained an order to view the premises, upon the back of which the terms were written, viz. Premium, 262*l.* 10*s.*; rent, 80*l.*; term, about sixteen years. At the lady's request, Messrs. Davies & Francis wrote to the defendant at the King's Arms, Cirencester, a letter as follows:—

"13th November, 1873.

"Sir,—We have been requested by Mrs. Dowdeswell to find her a lodging-house in this neighbourhood; and we have much pleasure in forwarding for your approval particulars [which were inclosed] of two which we think most likely to suit. We believe it is her intention to write you by same post, expressing her views, she having seen both.

(Signed) "Davies & Francis."

Shortly afterwards, at an interview between the plaintiff and the defendant, the latter remarked,—"Let me see, is it pounds or guineas?" to which the plaintiff replied, "Guineas: 250 guineas; the pounds for myself, the shillings for the agents." The plaintiff then pointed out various articles which the defendant would have to take to at a valuation. On the 14th of November the defendant wrote to Davies & Francis, as follows:—

"Gentlemen,—I have decided on taking No. 22, Belgrave Road, and have spoken to my private agent, Mr. W. Cruickshank, of Cruickshank, Brothers, 29, Great St. Helens, City, who will arrange matters with you, if you will kindly put yourselves in communication with him. I leave town this afternoon; so, if you have occasion to write to me, please address, as before, to Cirencester."

(Signed) "J. M. Dowdeswell."

The consent of the plaintiff's lessor to the assignment was duly

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obtained, and a draft assignment was sent by the plaintiff's solicitors to the defendant's solicitors. But, after much negotiation, the defendant retired from his engagement.

The cause was tried before Grove, J., at the second sitting at Westminster in this Term, when the question was, whether the two letters above set out constituted an agreement to take the premises. The plaintiff contended that the second letter, as explained by what passed at the subsequent interview, sufficiently referred to the first to constitute a complete and binding contract. The defendant contended that, even assuming that the first letter was incorporated by reference in the second, the two did not constitute a complete and final agreement, inasmuch as there remained terms to be arranged with the agent to whom the defendant in his letter referred the plaintiff's agents.

The learned judge, adopting the latter view, directed a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict for 70*l.*, agreed damages, if the Court should be of opinion that the two letters constituted a complete and binding agreement.

Day, Q.C. (*Grantham* with him), moved accordingly. The letters set out were the only letters which passed between the parties; and the second, as explained by the conversation at the interview between the plaintiff and the defendant, sufficiently refers to the first to make the two a complete agreement. No deviation of terms was ever suggested; these were all settled; and all that Mr. Cruickshank had to do was to see that the matter was carried out according to that arrangement. In *Morris* v. *Wilson* (1) it was held that, when a memorandum in writing, signed by the party to be charged, refers to another document in writing, it may be proved by parol evidence that a certain document is the one referred to. Vice-Chancellor Wood, in giving judgment, after referring to and distinguishing *Hodges* v. *Horsfall* (2), says: "In this case there is clearly a memorandum in writing referred to by the memorandum in writing signed by the party to be charged; and the only objection arises out of the question whether the former memorandum

(1) 5 Jur. (N.S.) 168. (2) 1 Russ. & M. 116.

can be identified. The case of *Shortrede* v. *Cheek* (1) is approved of by Sir J. Wigram in his valuable work on Evidence, p. 127, in which he came to the conclusion that a reference to another written instrument in the instrument signed by the party to be charged is sufficient. In that case, there was no reference in the memorandum to shew what the note was; but, during the argument, and also in the judgment, Parke, B., says: 'The letter refers to some note in the possession of the person to whom the letter is sent; if it turns out that there is only one note, although you are obliged to get at that by parol evidence, yet the case is not within the statute.' Here, there is a note signed by the party to be charged, referring to a list. If you find that there is produced a thing in writing which is a list of furniture at No. 1, Ulster Terrace, the property in question, and there is no suggestion of any other instrument, but, on the contrary, in his cross-examination, the defendant says he meant that list, then the case is on all-fours with *Shortrede* v. *Cheek* (1), and the list becomes incorporated with the agreement." It is difficult to discover any substantial distinction between that case and the present.

[BRETT, J. The letter of the 14th of November is not a distinct acceptance of the plaintiff's offer upon the terms mentioned in the letter of the 13th.]

No other terms were ever suggested.

[BRETT, J. But the plaintiff's agents are referred to Mr. Cruickshank, "who will arrange matters with you." That looks as if there had been no complete and definite agreement.]

Having agreed to take the premises on the terms proposed to him, the defendant merely refers the plaintiff's agents to the person who is to settle the details with them, such as the valuation of the furniture to be taken, and the preparation of the necessary conveyance.

LORD COLERIDGE, C.J. I am of opinion that there should be no rule. The verdict passed for the defendant on the ground that there was no sufficient agreement in writing to bind him. The

(1) 1 A. & E. 57.

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agreement suggested was made up of two letters. The first is dated the 13th of November, 1873, from the plaintiff's agents to the defendant, and was as follows:—"We have been requested by Mrs. Dowdeswell to find her a lodging-house in this neighbourhood; and we forward for your approval particulars of two which we think most likely to suit." Inclosed in this letter were particulars of two houses, one of which was No. 22, Belgrave Road, the terms for which were stated to be, premium 250 guineas, rent 80*l.*, and certain fixtures and planned furniture to be taken at a valuation. On the 14th of November the defendant wrote to the plaintiff's agents, as follows:—"I have decided on taking No. 22, Belgrave Road, and have spoken to my agent, Mr. Cruickshank, *who will arrange matters with you*, if you will put yourselves in communication with him. I leave town this afternoon; so, if you have occasion to write to me, please address, as before, to Cirencester."

I will assume, upon the authority of Vice-Chancellor Wood, in *Morris* v. *Wilson* (1), and the case of *Shortrede* v. *Cheek* (2), that there is a sufficient reference in the second letter to a former memorandum in writing, to let in oral evidence to shew what that memorandum was, and so to connect the two letters. But it is contended by Mr. Day that the second letter amounts to such an assent to the terms proposed by the first as to constitute a complete and binding contract, and that the subsequent reference to Mr. Cruickshank, to "arrange matters," does not detract from that absolute acceptance of the terms proposed. We must, however, look at the whole letter to see whether or not the mind of the defendant was assenting to all the terms proposed. His letter, as it seems to me, amounts to this,—You have submitted two houses for my approval; as far as concerns me, I prefer No. 22, Belgrave Road; my agent is Mr. Cruickshank; go and see him, and he will arrange matters with you,—that is, arrange with him the terms on which I am to become tenant of the house: if you cannot agree, write to me at Cirencester. If that be the fair interpretation of the defendant's letter, then it is plain that his mind never was at one with the mind of the plaintiff, and that there was no sufficient

(1) 5 Jur. (N.S.) 168. (2) 1 A. & E. 57.

acceptance of the offer to bind him. The whole remained in fieri.

BRETT, J. I agree with my Lord. I entertain a strong opinion that the second letter does not sufficiently refer to the first to incorporate all the terms contained therein as those upon which the defendant was minded to contract. But I entirely concur with my Lord that the proper construction of the letter is, "I decide to take No. 22, Belgrave Road, if you and my agent Mr. Cruickshank can agree upon the terms; if not, write to me." There clearly is no final agreement shewn on the face of the writings.

GROVE, J. I am of the same opinion. The words of the memorandum in *Morris* v. *Wilson* (1) were much stronger than those used here. If one man offers to let a house or to sell goods to another upon certain terms, and the other writes back, I agree to take the house or to purchase the goods upon those terms, that amounts to a complete agreement. But the letters here admit of a very different construction; and I must confess I think my Lord's reading of the second letter is the more reasonable one. It would seem a very strong thing to hold the defendant bound, where he names an agent who is to "arrange matters" on his behalf. There clearly was no binding agreement here.

Rule refused.

Attorneys for plaintiff: *Batty & Whitehouse.*

(1) 5 Jur. (N.S.) 168.

1874
Nov. 21.

GLOVER *v.* COLEMAN.

Easement—Light—Interruption not submitted to or acquiesced in—Prescription Act, 2 & 3 Wm. 4, c. 71, ss. 3, 4, 6.

The twenty years' enjoyment which under s. 3 of 2 & 3 Wm. 4, c. 71, gives an absolute and indefeasible right to the access of light, need not be an enjoyment in fact "without interruption" for the period mentioned, but an enjoyment without *such* an interruption as is contemplated by s. 4, viz. "an interruption submitted to or acquiesced in by the party interrupted for one year" after notice.

And, in order to negative submission to or acquiescence in the interruption, it is not necessary that the party interrupted shall have brought an action or suit, or taken any active steps to remove the obstruction: it is enough to shew that he has in a reasonable manner communicated to the party causing the interruption that he does not really submit to or acquiesce in it.

Where, therefore, the plaintiff had for more than twenty years enjoyed the access of light to his workshop, through a window against which the defendant had about fourteen months before action brought erected a permanent building which obstructed it, and the plaintiff had taken no active measures to cause the obstruction to be removed, but had several times, himself or by his tenant, complained of and protested against it:—

Held, that it was a question proper to be left to the jury whether or not there had been such a submission to or acquiescence in the interruption of the enjoyment as to deprive the plaintiff of the right to the light.

Semble, that the same sort of evidence of user or enjoyment need not be given in the case of a light as in the case of a claim of a right of way.

THIS was an action by the reversioner for the obstruction of light, to which the defendant pleaded a denial of the plaintiff's right to the light.

The cause was tried before Lord Coleridge, C.J., at the last Spring Assizes for the county of Stafford. The facts were as follows:—The plaintiff was the owner of premises at Stone, in the county of Stafford, known as Glover's Hotel, which was in the occupation of a tenant named Morley. In the yard of the hotel was a workshop in the occupation of one Nickling, and in this workshop was a window through which the tenant had enjoyed the access of light and air without interruption from 1845 or 1846, down to the year 1872. In May, 1872, the defendant, who was the owner of the adjoining premises, erected a shed (a permanent wooden structure) within 1 foot 7 inches of the window in question, and thereby considerably obstructed it.

As soon as the building was erected, Nickling complained of the obstruction to Morley, and the latter complained several times to the defendant's son, who said that his mother had a perfect right to build there, and refused to remove the obstruction. Again, in December, 1872, Nickling wrote a letter of complaint on the subject to Morley, and Morley, on the 3rd of January, 1873, wrote to the plaintiff, who seemed to have then for the first time had notice of the obstruction. The writ in this action was issued on the 3rd of July, 1873.

On the part of the defendant it was objected that there had been no such enjoyment of the light for twenty years next before the commencement of the action as to satisfy the terms of the Prescription Act, 2 & 3 Wm. 4, c. 71, and that the interruption had been submitted to or acquiesced in for more than a year,—the shed having been erected in May, 1872, and no action brought until July, 1873.

No questions were left to the jury; but the Lord Chief Justice directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a nonsuit or a verdict for him if the Court should be of opinion that there was no evidence of enjoyment of light and air through the window in question for the twenty years next before the commencement of the action, to satisfy the Act.

Bosanquet, in Easter Term last, obtained a rule nisi accordingly. He cited *Gale* v. *Abbot.* (1)

June 19. *H. Matthews, Q.C.,* and *H. D. Greene,* shewed cause. The material sections of the Act are the 3rd and 4th. Sect. 3 enacts that, "when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." And s. 4 enacts that "each of the respective periods of

(1) 8 Jur. (N.S.) 987.

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years hereinbefore mentioned [in ss. 1, 2, and 3] shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorizing the same to be made." In order to prevent the interruption from working a suspension or destruction of the twenty years enjoyment, it is not necessary that an action should be brought or that active steps should be taken to abate the obstruction: but the submission or acquiescence must be such as to amount to an acknowledgment that the interruption is rightful.

[GROVE, J. According to *Flight* v. *Thomas* (1), the right is acquired by an enjoyment for a period somewhat short of twenty years, provided there has not been an interruption acquiesced in for one whole year, under s. 4. In that case there was an enjoyment for nineteen years and 330 days, followed by an interruption (not acquiesced in) for 35 days; and it was held that the prescriptive right was gained.]

In a note to s. 4, in Gale on Easements, 4th ed. p. 160, it is said:—"A plea of enjoyment for such period can be supported only by evidence coming down to the commencement of the suit: *Parker* v. *Mitchell* (2); see also *Thomas* v. *Flight* (3), per Lord Cottenham,—'The cases prove this, not only that it is good to lay the right twenty years before the commencement of the suit, but that it is bad if it is not so laid; it is bad if it is laid next before the injury complained of:' see *Wright* v. *Williams* (4); *Richards* v. *Fry* (5); *Ward* v. *Robins* (6), acc. And, in order to support the plea of enjoyment during the period, actual user must be proved in the *first* and in the *last* years of the period relied upon. *Parker* v. *Mitchell* (2) shews that actual user during the *last* year,

(1) 11 A. & E. 688; affirmed in error, 8 Cl. & F. 231.
(2) 11 A. & E. 788.
(3) 8 Cl. & F. at p. 242.
(4) 1 M. & W. 77.
(5) 7 A. & E. 698.
(6) 15 M. & W. 237, 242.

and *Baily* v. *Appleyard* (1) and *Carr* v. *Foster* (2) that actual user during the *first* year must be proved: and the same points were recognised in *Lowe* v. *Carpenter* (3), where it was also suggested by Parke, B., that an act of user in every year of the period should be shewn to have taken place, although that opinion is opposed to the suggestion of the Court in *Carr* v. *Foster* (2), that, as to the intermediate period, it would not be necessary to shew an act of user in each and every year intervening between the first and last, and that more general evidence of user would suffice." (4) And see the judgment of Willes, J., in *Cooper* v. *Hubbuck*. (5) Under s. 3 the right is indefeasible where it has been enjoyed for twenty years without interruption.

[GROVE, J., referred to *Eaton* v. *Swansea Waterworks Co.* (6), which was a claim of a right to the flow of water.]

Section 4 is in aid of the dominant tenement. *Lowe* v. *Carpenter* (3), which will be relied on for the defendant, is an authority against the plaintiff so far as affirmative easements go. But here actual enjoyment is shewn up to the last, though interrupted. There was no submission to or acquiescence in the interruption for one year after notice. The first notice which the plaintiff received of the interruption of the enjoyment of the light was by the letter of the 3rd of January, 1873. It may be that Nickling, the tenant, had lost his right to complain; but the plaintiff clearly has not.

[BRETT, J. Who is the party whose enjoyment was interrupted?]

Both the plaintiff and Nickling; the former in the value of his reversion, the latter in his occupation.

The proposition contended for on the part of the defendant is, that no resistance short of bringing an action or abating the obstruction will save the right. *Bennison* v. *Cartwright* (7) however, shews that something far short of the bringing an action or

(1) 8 A. & E. 161, 778, n.
(2) 3 Q. B. 581.
(3) 6 Ex. 825; 20 L. J. (Ex.) 374.
(4) The claim in *Carr* v. *Foster*, 3 Q. B. 581, was of a right of common; in *Lowe* v. *Carpenter*, 6 Ex. 825, it was a right of way.
(5) 12 C. B. (N.S.) 456; 31 L. J. (C.P.) 323.
(6) 17 Q. B. 267; 20 L. J. (Q.B.) 482.
(7) 5 B. & S. 1; 33 L. J. (Q.B.) 137.

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the removal of the obstruction will do; and that it is for the jury to say whether there has been such an amount of resistance or remonstrance against the usurpation as to amount to non-submission or non-acquiescence. The judgment of Vice-Chancellor Kindersley in *Gale* v. *Abbot* (1), again, shews that the question whether or not there has been submission to or acquiescence in the interruption is for the jury; and, according to the reservation here, the verdict must stand unless the Court is satisfied that there was no reasonable evidence of non-submission or non-acquiescence on the part of the plaintiff.

Bosanquet, in support of the rule. If the question depended upon s. 3 alone, it may be conceded that the defendant would be out of Court. But, taking that section in conjunction with s. 4, the period required for the acquisition of the right is, the full period of twenty years next before action brought,—that is, *some* action: *Cooper* v. *Hubbuck*. (2) The question is not whether the easement once gained has been lost or abandoned; but whether it has ever been gained. The main object of the statute was to confine the evidence and the attention of the Court to a given limit of time next before the commencement of an action.

[GROVE, J. An unsuccessful action or suit might be enough.]

Be it so. *Flight* v. *Thomas* (3), which is not authority, but has now become dogma, seems to go that length. The first case in which it is distinctly laid down that enjoyment for the period mentioned in s. 3 gives only an inchoate right, is *Ward* v. *Robins* (4), where Parke, B., says: "Such enjoyment, in order to give a right under that statute, must be made up to the time of *the commencement of the suit*, not up to the time of the act complained of; and, consequently, an enjoyment for twenty years or more before that Act gives only what may be termed an inchoate title, which may become completed or not by an enjoyment subsequent, according as that enjoyment is or is not continued to the commencement of the suit. This apparent absurdity arising from a strict construction of the Act, has already been fully considered

(1) 8 Jur. (N.S.) 987.
(2) 12 C. B. (N.S.) 456; 31 L. J. (C.P.) 323.
(3) 11 Ad. & E. 688; in error, 8 Cl. & F. 231.
(4) 15 M. & W. 237, 242.

by this Court in the case of *Wright* v. *Williams* (1), and the literal interpretation adhered to, the Court intimating its opinion that the mischief of such a construction was rather apparent than real; and the decision in that case was fully approved of and acted upon by the Court of Queen's Bench in the case of *Richards* v. *Fry*." (2)

[BRETT, J. This point does not arise if there was evidence of non-acquiescence in the interruption of the enjoyment. In that case, the question should have been left to the jury; and the defendant cannot have a verdict entered for him.]

In the case of light, it is difficult to say that there has been enjoyment, if there has been an obstruction. To sustain the prescriptive claim, there must be enjoyment in fact for twenty years before action. An interruption, though for less than a year, prevents the actual enjoyment. Section 6 has some bearing on this question: it enacts that, "in the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for any such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim." (3) The "party interrupted" means the person who is obstructed in the enjoyment of the light. Here, Nickling had held the workshop during the whole time the window in question was in existence. Glover, the present plaintiff, is not the "party interrupted;" he is merely setting up a right through his tenant. It is enough if the person in actual enjoyment of the light has been obstructed or interrupted. In *Parker* v. *Mitchell* (4), a plea of forty or twenty years user (of a way) under the statute, was held not to be supported by proof of user from a period of fifty years before the commencement of the action down to within four years of it; and that, if the evidence go no further, there is no case for the jury. In the course of the argument, Lord Denman, C.J., asks (5): "How can you say that you have proved

(1) 1 M. & W. 77.
(2) 7 A. & E. 698.
(3) See *Bright* v. *Walker*, 1 C. M. & R. 211, 222.
(4) 11 A. & E. 788.
(5) 11 A. & E. at p. 790.

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an enjoyment for the forty years? Would it be enough to prove that you had the user so late down as thirty-nine years ago, without proof of user since then?" So, in *Lowe* v. *Carpenter* (1), which was also a claim of a right of way, a plea of forty years' prescriptive right of way was held not to be supported by proof of user for forty years and upwards before the commencement of the action, to within fourteen months of it; and that some act of user must be shewn to have been exercised in the year in which the action is brought; and Parke, B., threw out an intimation that some act of user ought to be shewn to have been exercised at least once a year.

[BRETT, J. That suggestion seems to be confined to the case of a right of way.]

There must be actual enjoyment for twenty years next before the commencement of an action, and no interruption submitted to or acquiesced in for one year.

[BRETT, J. There had been actual enjoyment of the easement for more than twenty years, and an actual obstruction or interruption for more than a year, the plaintiff or his tenant protesting against it during all that time.]

And nothing more done. The question is whether merely protesting against or complaining of an interruption, without taking any steps to assert the right or to abate the obstruction, is enough to shew non-acquiescence. It may be that it is not necessary actually to commence an action or suit. Non-acquiescence may possibly be shewn by something short of that. But it must be something tangible, and not a mere grumbling complaint; it must be a substantial assertion of a right to the enjoyment of the light or other easement,—some act for which an action might be brought by the adverse party to try the right. *Bennison* v. *Cartwright* (2) does not touch this point: there, the wall which obstructed the way had been knocked down the day before the issuing of the writ.

[GROVE, J. BLACKBURN, J., put it rather on the ground that negotiations were going on: and the other judges seem to adopt the same view.]

(1) 6 Ex. 825; 20 L. J. (Ex.) 374. (2) 5 B. & S. 1; 33 L. J. (Q.B.) 137.

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Gale v. *Abbot* (1) is precisely in point. There, an obstruction to a light had existed more than twelve months; but a promise had been given to remove the obstruction, and twelve months had not elapsed from the date of that promise before proceedings were taken; and the judgment of Kindersley, V.C., shews, that, but for that circumstance, he would have held that the right to the light had not been gained.

BRETT, J. On the trial of this case before the Lord Chief Justice certain evidence was given, and his Lordship directed that a verdict should be entered for the plaintiff, leave being reserved to the defendant to enter a nonsuit or a verdict for him, if the Court should be of opinion that the Lord Chief Justice ought to have directed a nonsuit or a verdict for the defendant. Upon such a state of things, there is an agreement by the counsel for the defendant that, if there was evidence on which a jury might have found for the plaintiff, the verdict must stand as entered; and, after such an agreement, he must satisfy the Court that there was no evidence upon which a verdict could properly be found for the plaintiff, and that the facts were such that the judge ought to have directed a nonsuit or a verdict for the defendant.

Now, the question arose with regard to the enjoyment of a certain easement, and to the interruption of that enjoyment within 2 & 3 Wm. 4, c. 71. On the part of the plaintiff it was said that he had enjoyed the access of light through a certain window for twenty years, and that, according to the proper construction of the statute, he had in contemplation of law enjoyed it for the twenty years next before the commencement of the action. On the part of the defendant, it was admitted that the plaintiff had enjoyed the access of light through the window in question for twenty years; but it was said, first of all, that he had not enjoyed it for the last twenty years previous to the bringing of the action, and, secondly, that there had been an interruption of his enjoyment for more than a year immediately preceding the commencement of the action, submitted to or acquiesced in by him.

Upon the first point taken on the part of the defendant, Mr.

(1) 8 Jur. (N.S.) 987.

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Bosanquet contended that there was no enjoyment in fact of the access of light for the twenty years before the commencement of the action, because, he said, such enjoyment had been prevented. He says that, if such prevention in fact is not fatal to the claim of right, there is an absurdity in the statute; for that it provides that there is to be an actual enjoyment for the twenty years next preceding the commencement of a suit, and although in another part it speaks of an interruption and says that that interruption under certain circumstances shall not be counted as an interruption, still, he says, if in fact there is a prevention of an enjoyment, it is inconsistent, if not absurd, to say that there has been an enjoyment for the twenty years preceding the action. That is, in other words, to put forward again the difficulty of the construction of the Act which was urged in *Flight* v. *Thomas*. (1) Now, the judges who decided that case, and those who have considered it and commented upon it have all agreed that there is a peculiarity about the Act which amounts almost to an inconsistency, and which may by critical persons be considered an absurdity; still they all say that, upon the true construction of the Act, that peculiarity does arise and must be dealt with. Where the state of things for twenty years before action has been as if there had been no interruption, because, by the 4th section of the Act, that which has been an interruption in fact is to be considered in point of law as not an interruption, it is said that then there is an actual enjoyment in contemplation of law, although there has been no actual enjoyment in point of fact. Upon this point, Mr. Bosanquet also relies upon the case of *Lowe* v. *Carpenter* (2), and says that, although there has been no interruption at all, yet, if there has been a cessation of enjoyment for more than a year, there has been no actual enjoyment of the right for the twenty years next preceding the action. But the easement which was in question in that case was of a different kind from that in the present case. It was the case of a right of way. The mode of enjoyment of such an easement is by the person who claims it doing particular acts which he may do or abstain from doing at his own will and pleasure; and, although there was no actual interruption of his

(1) 11 A. & E. 688; 8 Cl. & F. 231.
(2) 6 Ex. 825; 20 L. J. (Ex.) 374.

right to do that, yet, for more than a year before the commencement of the action, the plaintiff had abstained from the exercise of his right. If so, he did not actually enjoy it: and that is all that that case amounts to. Applying that to the enjoyment of light and air through a window, it would be an authority for this, that, if a party who has enjoyed such an easement, say, for eighteen years, chooses to brick up the window for more than a year during the twenty years preceding the commencement of an action, although there would have been no hostile interruption of his enjoyment by anybody else, there would have been a non-enjoyment, an interruption of the enjoyment, by his own act, which might deprive him of the right. (1) The doctrine of *Lowe* v. *Carpenter* (2) would probably be applicable to such a case as that. But Mr. Bosanquet has himself said that the enjoyment of this easement of the access of light and air does not depend upon the act from day to day of the person having the right to the enjoyment. He need not look out of the window. That which he claims is, the free passage of the light and air through the window into his house, which does not depend upon any act of his, as long as the window remains unobstructed. Here, the window did remain open for twenty years; and it remained open down to the time of action brought. It had been open for more than twenty years; and it was open during the twenty years immediately preceding the action. The light and air, therefore, would have had access through this window down to the time of action brought, but for the interruption. Now, that interruption was not the act of the plaintiff, but was the act of the defendant.

Then comes the question, what is the true significance of that interruption. In point of fact, the actual interruption had existed for more than a year preceding the commencement of the action. But the plaintiff (or his tenant) had protested against the interruption, on more than one occasion, to the person who caused it. He had not merely expressed discontent to those who were about him, but to the person who erected the obstruction; and this expression of discontent is described to have gone to the extent of protesting against what she was doing. It is true, the plaintiff had taken no steps to abate the obstruction. It is true that he had brought no

(1) See *Lawrence* v. *Obee*, 3 Camp. 514; *Moore* v. *Rawson*, 3 B. & C. 332.
(2) 6 Ex. 825; 20 L. J. (Ex.) 374.

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action: but then we must consider what was the kind of interruption. It was not by merely putting boards before the window, or anything which might easily be got rid of. It was an interruption by erecting a shed or building in front of the window. Under these circumstances, the question is whether within the true interpretation of s. 4 of the statute there was evidence which was proper to be left to the jury that the plaintiff had not submitted to or acquiesced in the interruption for one year. The interruption had actually existed for more than a year: therefore the question comes to be whether there was evidence which might properly be left to the jury, and from which the jury might reasonably find, that the plaintiff had not submitted to or acquiesced in the interruption within the true interpretation of the statute. On the part of the plaintiff it was submitted that, upon the facts which were in evidence, and not contradicted, there was enough to warrant the jury in inferring that he had neither submitted to nor acquiesced in the interruption of his right. Mr. Bosanquet, for the defendant, contended that there was nothing to leave to the jury,—that, in order to negative such submission or acquiescence, the plaintiff must have done some act for the doing of which the defendant might have had a right of action against him. Now, that depends in a great measure upon the true construction of the words of s. 4. The words are, that "no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorizing the same to be made." That phraseology assumes that there has been an interruption in fact, but says that it shall not be deemed in point of law an interruption, unless the same shall have been submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof. Mr. Bosanquet seemed to admit that the judge was not bound to tell the jury that the plaintiff acquiesced in the interruption here: but he said that he had submitted to it. That depends upon what is the true construction of the phrase "submitted to." Inasmuch as the framers of the Act have not used the words "unopposed" or "agreed to," but have used words

which are intermediate between a positive or active opposition or an active agreement, the proper construction of the section seems to me to be this:—Acquiescence, according to my view, would mean, not an active agreement, but what may be called a tacit, a silent agreement,—a submission to a thing by one who is satisfied to submit. The question for the jury, therefore, upon a suggested acquiescence, would be, whether the plaintiff, although he has not specifically agreed that the thing should be done, has submitted to it, and has been satisfied to submit. Now, "opposition," on the other hand, I should say would mean dissent or dissatisfaction manifested by some act of opposition. "Submitted to," in this part of the section, seems to me to be something intermediate between a submission by one satisfied to submit and a dissatisfaction manifested by some act of opposition. It seems to me that what it means is this,—submission without satisfaction and without any direct act of opposition, and although discontent be made apparent by some expression or some act. If that be so, the question for the jury would be this,—Although it be clear that the plaintiff did not submit to the interruption, being satisfied to submit, nevertheless, did he submit, though with discontent, and though it was made apparent? This would render necessary an inquiry into the state of mind of the person who is said to have submitted, and whether his state of mind was made apparent by either expressions or acts. Here, we have the fact of the interruption existing, and of the plaintiff not doing anything which amounts to active resistance. We have strong intimations by him, not merely to persons about him, but to the person who caused the interruption, that he was not satisfied to submit to it,—complaints made more than once, and made in such a manner as to be described by witnesses as amounting to protests. We have the fact that the interruption was caused by the erection of a somewhat solid edifice, the fact that he did not knock it down the jury might fairly say was not evidence that the plaintiff acquiesced in or submitted to what the defendant was doing. Now, these protests, coupled with the fact of the substantiality of the building put up by the defendant, and taking into account that all took place within the space of a little more than a year, and giving consideration also to what was the condition in life of the plaintiff and to the fact that an action was commenced immediately after the year, seem to

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me all together to amount to facts upon which a jury might properly say that the plaintiff did not acquiesce in the interruption of his right, in the sense I have suggested; and that, although he did not more actively oppose it, and although in one sense he submitted, yet that he submitted without satisfaction, and with discontent in his mind which he made apparent to the defendant by acts or sayings which were a reasonable mode of expressing his discontent, under the circumstances in which he was placed. I am of opinion that there was evidence upon which the jury might reasonably find that the plaintiff did not acquiesce, and that they might reasonably find that he did not submit, because, although in one sense he submitted, yet he had discontent in his mind, and having expressed his dissent to the person who had caused the interruption in a way which shewed that he did not intend to submit. I therefore think there was evidence upon which the jury might find that there was an interruption in fact of the plaintiff's enjoyment of the light, but that, although that interruption had existed for a year, it had neither been acquiesced in nor submitted to by the plaintiff; that, under these circumstances, the right, which but for this interruption would have existed for the full period of twenty years next before action brought, was not interfered with; and consequently that the verdict was properly entered for the plaintiff at the trial, and that this rule, according to the terms of the reservation, must be discharged.

GROVE, J. I am of the same opinion. The first branch of Mr. Bosanquet's argument was,—and I wish to put it as clearly as I can, and in the most forcible way,—that, as the statute says that, when the access of light shall have been actually enjoyed for the full period of twenty years without interruption, the right shall be deemed absolute and indefeasible, in order to acquire such right there must have been an enjoyment in point of fact for the period named; and here, he says, there was no enjoyment in fact for a year, and consequently that the plaintiff cannot be said to have "actually enjoyed" the light for the full period of twenty years. Now, it seems to me, that, upon that point, *Flight* v. *Thomas* (1) is a direct authority against him. In that case there undoubtedly

(1) 11 A. & E. 688; affirmed, 8 Cl. & F. 231.

was no enjoyment in fact for the full period of twenty years, because there was an interruption for thirty-five days of the time necessary to make up the twenty years' enjoyment. But the ratio decidendi was, that, in order to prevent there being an actual enjoyment within s. 3 of the statute, the interruption must be such as to come within s. 4. That being so, *Flight* v. *Thomas* (1) is an authority to shew that "actual enjoyment" in s. 3 means an enjoyment for twenty years without such an interruption as is contemplated by s. 4, that is, an interruption submitted to or acquiesced in for one year after notice. There was no such interruption in that case. So, here, there has been actual enjoyment by the plaintiff of the access of light through this window for the full period of twenty years, but for an interruption. Now, what was that interruption? If the legislature had said that there must be actual enjoyment for twenty years, without regard to s. 4, then the plaintiff undoubtedly had not that enjoyment, because for a portion of that period he had ceased actually to enjoy the access of light. But then comes the question, has he actually enjoyed it for the full period of twenty years without such interruption as is contemplated by the 4th section of the Act? The words of that section, as applicable to this question, are, that "no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorizing the same to be made." Therefore, unless this interruption has been submitted to or acquiesced in for one year, it is not such an interruption as within the meaning of the statute will prevent the enjoyment being "an actual enjoyment without interruption." Then we come to the words "submitted to or acquiesced in." Now, the statute does not prescribe any particular mode of resistance. The statute does not, indeed, use the word "resistance," although Mr. Bosanquet in the course of his argument used it as opposed to submission or acquiescence. There being, then, nothing in the statute to guide us as to what shall be the nature of the submission or acquiescence, that must necessarily be a question of fact,—has the party interrupted, by his words or conduct, submitted to or acquiesced in the interruption, or has he resisted or protested against it? There

(1) 11 A. & E. 688; affirmed, 8 Cl. & F. 231.

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are, no doubt, various modes of resistance or of expressing dissatisfaction. I quite admit that mere grumbling, or complaining to a member of his family, or expressing dissatisfaction to a third person, would not be sufficient evidence of non-submission or non-acquiescence to leave to a jury. But, where protests are made to the party causing the interruption,—and we must, I think, take it that the protests or complaints here which were made to the son, were made to a person who represented the defendant, and were communicated by him to the defendant (or, at all events, if the defendant had intended to contest that, the point should have been made at the trial, and then it would have been a question for the jury),—the matter for our consideration is, whether there is any reasonable evidence which ought to have been submitted to the jury, upon which they might have determined whether the interruption was or was not submitted to or acquiesced in by the plaintiff. I do not see how it can be other than a question for the jury. Mr. Bosanquet has put some extreme cases: would a protest continued for ten years, he asks, keep alive the plaintiff's right? That, in all probability, would be negatived by a jury properly directed. And, here I would refer to a case which seems to be very applicable to this subject. I mean the case of *Carr* v. *Foster* (1), where a similar argument was urged. There, a commoner had ceased to use the common during two years of the thirty (under s. 1), having no commonable cattle at the time, but had used it both before and since those two years; and it was held that a jury were justified in finding a continued enjoyment of the right during thirty years. Now, as far as the first branch of Mr. Bosanquet's argument went, there was more than an interruption in that case; there was a disuse by the party himself; but the Court held that that was a question for the jury. Mr. Justice Patteson, after referring to and reading ss. 4 and 6, says (2): "It is always for the jury to say whether during any intermediate part of the period an actual enjoyment has been had. How many times the right has been exercised is not the material question, if the jury are satisfied that the claimant exercised it as often as he chose. It is suggested that the argument for the plaintiff might apply equally if there were a cesser for seven years. I am not prepared to say that it would not. It might be

(1) 3 Q. B. 581; and see *Hall* v. *Swift*, 4 Bing. N. C. 381.
(2) 3 Q. B., at p. 588.

that, under the circumstances, the party had no occasion to use the right. The question would always be for the jury. So long an intermission would be a strong piece of evidence against the continued right; but it would be for them to determine." It seems to me that that case is a direct authority that the question of submission or acquiescence, or, in other words, the conduct of the party, is for the jury. Mr. Bosanquet does not limit himself to one mode of non-submission or non-acquiescence, as seems to have been the contention in *Bennison* v. *Cartwright* (1), because he admits that the dissent may be manifested by some act done short of commencing an action or suit. Still it must always be a question for the jury quo animo the act was done. *Bennison* v. *Cartwright* (1) seems to me to be very much in point. I cannot see on the ratio decidendi that there is anything in that case to support the argument that the Court relied either wholly or in part on certain acts of pulling down the obstruction or breaking into the land in question,—that is to say, by a forcible act of remonstrance against the obstruction. It would seem,—though that may possibly be doubtful on the statement of the case,—that those acts were done after a whole year had elapsed. But I rely upon the language of the judges in that case. In the course of the argument, Blackburn, J., says (2): "The interruption was acquiesced in so far as that the wall was allowed to remain standing" (my Brother Blackburn cannot therefore mean that the pulling down the wall was the only way of shewing the party's non-acquiescence): "but there was correspondence going on, and the plaintiff was protesting against his rights being interfered with." And in giving judgment he says (3): "I cannot arrive at the conclusion that there must be acquiescence in the interruption unless an action be brought. We find that the wall was built, and that negotiations were going on till the 13th of February, 1862; and it cannot be said that the defendant was acquiescing in the obstruction through all that time." He does not say a word about there being any act; he rests his judgment wholly upon the negotiations as shewing that there was at all events evidence for the jury that the defendant had not acquiesced. Neither Mr. Justice Crompton nor Mr. Justice Mellor say one word about any act done with regard to the wall. Mr. Justice Crompton,

(1) 5 B. & S. 1; 33 L. J. (Q.B.) 137. (2) 33 L. J. (Q.B.) at p. 138.
(3) 33 L. J. (Q.B.) at p. 141.

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in express terms, says (1): "It seems to me it is for the jury to say whether the interruption has been acquiesced in or not." Now, it is perfectly true, as Mr Bosanquet said, that the learned counsel very much pressed upon the Court that the bringing an action would be necessary. But even that, as it appears to me, would not be conclusive. The mere suing out of a writ might be a more feeble protest than the acts of the plaintiff in this case. It would be for the jury to say whether the writ was issued really to enforce the right or was a mere sham. The argument urged by Mr. Bosanquet might be applicable where the party sued out a succession of writs for seven or ten years; it would be for a jury to say whether or not the issuing of the process was a bonâ fide assertion of a claim of right. It must in all cases be a question of degree. It is for the jury to determine whether the conduct of the party has been such as to demonstrate to the party who causes the interruption that he does not submit to or acquiesce in it. *Bennison* v. *Cartwright* (2), so far as it goes, decides that reasonable remonstrance and notice that the interruption is not assented to is matter to be submitted to the jury; and I find no case which decides the contrary. It seems to me that there was evidence of this in the present case, and consequently that the rule to enter a verdict for the defendant should be discharged.

BRETT, J. I wish to add,—I had intended to do so in the course of my judgment,—that I think *Bennison* v. *Cartwright* (2) a strong authority in support of the opinion I have expressed in this case; and that *Gale* v. *Abbot* (3) is not an authority to the contrary. That was not a decision that there would not be evidence to go to a jury, but only a finding by the Vice-Chancellor Kindersley, upon the facts before him, that the party had in point of fact acquiesced in the obstruction.

Rule discharged.

Attorney for plaintiff: *F. C. Greenfield, for E. H. Young, Longton, Staffordshire.*

Attorney for defendant: *G. F. Cooke, for W. Saben, Stone, Staffordshire.*

(1) 33 L. J. (Q.B.) at p. 140. (2) 5 B. & S. 1; 33 L. J. (Q.B.) 137.
(3) 8 Jur. (N.S.) 987.

MS. 847

Applied. SIR LINDSAY PARKINSON & CO., LTD. *v.* COMRS. OF WORKS AND PUBLIC BUILDINGS. [1950] 1 All E.R. 208.

[IN THE EXCHEQUER CHAMBER.]

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Dec. 2.

JACKSON *v.* THE UNION MARINE INSURANCE COMPANY, LIMITED.

Marine Insurance—Loss of Freight—Delay through Perils of the Sea—Frustration of Adventure—Right of Charterer to refuse to load.

The plaintiff, a shipowner, in November, 1871, entered into a charterparty, by which the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. The plaintiff effected an insurance on the chartered freight for the voyage. The ship sailed from Liverpool on the 2nd of January, 1872, and on the 3rd got aground in Carnarvon Bay. She was got off by the 18th of February and repaired, the time necessary for the completion of such repairs extending to the end of August. In the meantime, on the 15th of February, the charterers had thrown up the charter and chartered another ship to carry the rails (which were wanted for the construction of a railway) to San Francisco. In an action by the plaintiff on the policy of insurance on the chartered freight, the jury found that the time necessary for getting the ship off and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers:—

Held, by Bramwell, B., Blackburn, Mellor, and Lush, JJ., and Amphlett, B. (Cleasby, B., dissenting), affirming the decision of the Court below, that the charterers were, by reason of the delay, not bound to load the ship, and that there was therefore a loss of the chartered freight by perils of the sea.

APPEAL from the decision of the Court of Common Pleas making absolute a rule to enter a verdict for the plaintiff. (1)

Benjamin, Q.C. (with him *C. Russell, Q.C.*, and *Aspland*), for the defendants.

Butt, Q.C. (with him *Gully*), for the plaintiff.

The facts and pleadings are set out in the report of the case in the Court below (1), and the arguments and authorities cited are sufficiently referred to in the judgments.

Cur. adv. vult.

Dec. 2. There being a difference of opinion, the following judgments were delivered:—

CLEASBY, B. The question in this case was, whether there was

(1) Law Rep. 8 C. P. 572.

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a total loss by perils of the sea of the freight to be earned under a charterparty.

By the charterparty, the vessel *Spirit of the Dawn* was to proceed from Liverpool to Newport, and there take on board and carry to San Francisco a cargo of iron rails.

The vessel sailed from Liverpool on the 2nd of January, 1872, got aground on the 3rd upon the rocks in Carnarvon Bay, was got off and taken to a place of safety on the 18th of February, then taken to Holyhead, and afterwards to Liverpool, where she was sold by auction on the 13th of June for 5300*l.* The purchasers repaired her; and it was proved that, on the 15th of August, it would take about a fortnight more to complete the repairs. But, in the meantime, after the vessel got on the rocks, and as soon as it was plain that some time would be required for her repairs, attempts had been made by the charterers to come to some arrangement with the plaintiff for taking up another ship to forward the rails, which were wanted for the construction of a railway. The plaintiff refused to release the charterers from their contract; and on the 16th of February the charterers chartered another ship, by which they forwarded the rails.

Under the circumstances, the plaintiff, who had effected an insurance for 1500*l.* on chartered freight valued at 2900*l.* upon the voyage from Liverpool to Newport, and thence to San Francisco, claimed for a total loss, on the ground that he was prevented by sea perils from earning the freight.

The case was tried at Liverpool before Brett, J.; and he may be considered for the purpose of the present case to have left two questions to the jury, viz. first, whether the time necessary for getting the ship off and repairing her so as to be a cargo-carrying ship, was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of the time,—and secondly, whether such time was so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the charterers.

The jury found both questions in the affirmative; and the learned judge, being of opinion, notwithstanding the findings of the jury, that there was no evidence of a loss of freight by the

perils insured against, directed a verdict for the defendants, reserving leave to move to enter a verdict for the plaintiff.

A motion was made, and afterwards a rule made absolute to enter a verdict for the plaintiff as for a total loss of freight.

The question upon the case on appeal is stated to be, whether the plaintiff is entitled to have the verdict entered for him; and, if the Court is of opinion that he is so entitled, then judgment is to be entered for 1500*l.* or such sum as the Court, or an average-adjuster appointed by them, shall direct.

The principal question argued before us was, whether the necessary delay caused by the getting the vessel off the rocks and repairing her, and which had the effect found by the jury, disentitled the plaintiff to insist upon the performance of the charterparty, by reason of its being an implied term and condition of the charterparty that the vessel should arrive at Newport within a reasonable time.

Another question was also raised by the learned counsel for the defendants, viz. that, supposing there was such an implied term, and the plaintiff was disabled by the delay from insisting upon the performance of the charterparty, still the loss of freight was not the immediate consequence of the sea-damage, but of the right exercised by the charterers of throwing up the charterparty, which they might or might not have done, and in doing which they were influenced by the exigency of the particular case and the necessity of getting the rails to San Francisco as soon as possible. And it was forcibly argued that, if this necessity had not existed, and freights had risen, the charterers would have claimed the performance of the charter; and that the underwriters were only responsible for the necessary consequences of sea-damage, and not for a loss arising from the manner in which any option or right is exercised.

This view was rejected by the Court upon the argument, and, as I think, upon the ground that, at the time of the alleged loss, the plaintiff's interest was the right under the charterparty to have the rails loaded, and so to earn the freight; and that, as soon as that right was destroyed by sea-damage, there was a total loss of his interest by the perils insured against. If the question had been a new one, I should have thought it followed from the inte-

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rest lost being the right under the charterparty to have the executory contract of the freighters performed, that the total loss would be measured by the value of that right, and that the proper course would be, not to enter the verdict for 1500*l.*, but to resort to the second alternative above referred to, and have the verdict entered for such sum as an average-stater shall direct. But the authorities are decisive that, where there is a charterparty under which the shipowner will be entitled to certain freight, as soon as the voyage under the charterparty has commenced the right to the whole freight attaches: and, as I cannot presume to overrule those authorities, so far as the question now under consideration is concerned, the verdict is properly entered.

But this was not the principal question raised in the case argued before us. The principal question was one of great interest, because the decision upon it not only decides the case before us but regulates the conduct of all who enter into charterparties,—a very numerous class of persons of many nations, and who ought to have some known rule to act upon. The question is whether, under the circumstances of the present case, the plaintiff was entitled to repair the vessel (using all proper dispatch in doing so), and to call upon the charterers to fulfil their charter. I agree with the opinion expressed by my Brother Brett at the trial, and adopted by Lord Chief Justice Bovill in the Court below, that the findings of the jury are immaterial, and that, upon such facts as the present, which are free from question, it was not for the jury to put a construction upon those facts, but for the law to determine the rights of the parties upon them. Indeed, I think the law has already done so by settled principles and decided cases.

The settled principle is, that, where in an agreement a provision is made applicable to a particular subject, that provision forms the agreement on that subject. The rule is, Expressum facit cessare tacitum. There is no further qualification or limitation to be implied. This is essential to all certainty in the obligations which persons place themselves under; or the agreement would be the uncertain conclusion of a particular jury as to what was reasonable or convenient. In such a case as that under consideration, the charter relates to a voyage necessarily

exposed to disasters causing delay, and the whole enterprise is made subject to the consequences of these disasters; the voyage from Liverpool to Newport and from Newport to San Francisco equally so. It must not be read as an agreement the object of which is proceeding from Liverpool to Newport: the object of the agreement is, carrying a cargo of rails from Newport to San Francisco. There is no limit to the time to be occupied in doing so, unless the delay be caused by some breach of duty. If the rails had been taken on board at Newport, and the vessel had gone upon a rock the day after leaving Newport, no matter how great the delay, the shipowner would have been entitled to repair, to earn the freight under the charter by completing the voyage. No one disputes this: and the same thing may happen over and over again in the several parts of so long a voyage as from Newport to San Francisco, which in the result may not be completed within a year, or even possibly two years. Still, the charter would continue in force. If the goods were intended for a particular market or a particular purpose, it would not be a question whether an unreasonable time had been occupied, or whether the commercial speculation of the charterparty was at an end; so far as the charterers were concerned, their commercial speculation must have been ruined by the delay; and so far as the shipowner was concerned also (except so far as he was indemnified by insurances, or, possibly, by means of valued policies, was making a profit of each disaster); but still the agreement would continue, because nothing had happened except what was provided for. The agreement for conveying the rails from Newport to San Francisco is as much acted upon by setting sail from Liverpool with the ship equipped for the voyage and prepared to receive the cargo of rails, as if the rails had been taken on board; and the same rule of course ought to apply. It cannot properly depend upon the part of the voyage in which the damage is sustained. The preliminary voyage might be a long one, to the other extremity of the globe, and the disaster happen towards the end of it: the rule must be the same whether it be to Newport to carry out rails, or to the Chinchas to bring home guano.

The principal argument addressed to us was, that convenience was so much in favour of the charterparty not continuing in force

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after a delay of unusual and unreasonable length in proceeding to the port of lading, that a term or condition ought to be implied making the charter no longer obligatory upon the freighters after such delay.

I have already pointed out that it is one voyage under the charterparty, and that the inconvenience of detention would apply to all parts. It would be extremely inconvenient that the rails which were wanted at San Francisco should be loaded and detained at Monte Video or Valparaiso for four or five months, when they might be forwarded at once at an easy freight to San Francisco; and yet that would not affect the charterparty. But, independently of this, it appears to me that, when the matter is properly considered, the argument of convenience is entirely against the implication contended for.

The rule to be laid down not only settles the rights of parties to such an agreement, but regulates their conduct in a very important matter. The question is, what are the masters of vessels under charter to do when they have sustained damage? They are in a position of trust and great responsibility,—belonging to all nations,—and ought to have a clear and definite rule of conduct to go by. The rule of conduct which the law has hitherto prescribed is, "Repair your vessel, and proceed with your charter." But the rule now sought to be laid down would place shipowners and freighters in a position of the greatest uncertainty and difficulty. Instead of having a clear course to pursue, without delay, and independent of collateral considerations such as I have mentioned, the master of a damaged vessel is to form a conclusion upon a doubtful matter, viz. the time to be consumed in repairs, and then, either by himself or with the assistance of others, to get at the effect of this, and thus satisfy himself whether the delay is likely to make it unreasonable for the charterer to wait, or, in the words of the case, whether the delay would put an end in a commercial sense to the commercial speculation entered into between him and the charterer.

It would be a puzzling question for him to answer, if he understood it. The answer would depend upon a variety of circumstances. The captain might say, "The commercial speculation which I entered into was and continues an excellent one. I had a

charter for San Francisco at a high freight, and have from my connections a good expectation of finding a return cargo at San Francisco, and freights have here now fallen." The charterer, if freights had fallen, would say, "This has been a bad commercial speculation for me; and the best thing I can do would be to get out of it, and hire a vessel at once at a lower rate of freight." If, on the other hand, freights had risen, the captain would wish to get out of the charter and procure a high freight; and the freighter contrariwise. Thus, while upholding the charter in its terms, you give a rule of conduct which is certain, clear, and not influenced by unfair collateral considerations of interest; by introducing the suggested implication, you make the course of conduct difficult, dependent upon doubtful intervals of time, and results which cannot be ascertained, and expose it to the influences which I have suggested. In short, one rule makes it the duty of both parties under all circumstances to uphold the charter; the other, in every case of considerable damage and necessary delay in repairing, gives each party the chance of getting out of the charter, according as it is his interest to do so.

As is usual in all arguments founded upon convenience, we were pressed by extreme cases; and it was asked how long a man was to keep a cargo,—perhaps a perishable one: was he to keep it for months, a year? The answer is, that, if the cargo is of such a nature, or an early shipment of vital importance, the charterer should have a special clause in the contract; but, if he does not, still the contract is not one upon which there can be a claim for a specific performance. As soon as it is plain that the delay will be really serious as regards the condition of the intended cargo or the purpose to which it was destined, the charterer should forward his cargo by another vessel. He does not by doing so break his contract, because he may provide another cargo. If he cannot do so, he should give notice at the earliest period to the shipowner. He will be liable in damages, no doubt, but not to the freight; and the amount will depend upon the state of freights. If freights had risen, the shipowner would sustain but little damage; and the charterer would himself be a loser by forwarding his cargo at a high rate. If freights had fallen, there might be a considerable liability; but the charterer would share the

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advantage by having his goods forwarded at an easier rate. In the present case, the damages would probably not be heavy; for, all the loss of delay and detention would not be the fault of the charterers, but be caused by perils for which they were not responsible; and the shipowner would be in the same state as he was in before he started.

The charterparty might perhaps be so framed as to make the charterer liable for a specified amount of stipulated damages for a particular default. If this were so, it would be his fault for entering into such a stipulation, when the delay by sea perils would be so serious. In the present case, as is usual, the penalty for non-performance would not make the liability greater than the damages sustained.

It appears to me, therefore, that too much stress was laid during the argument upon the apparent injustice which would be done in a particular case of extreme delay if the charter was upheld, and not sufficient regard had to the general inconvenience which would arise if the charter were defeated in such cases; and that, so far as the argument from convenience is concerned, it preponderates in favour of a construction which gives a certain, clear, and honest rule of conduct to act by in all cases, upholding a contract, over one which introduces uncertainty and difficulty as to conduct, and admits of reasons for defeating a contract which are to be derived from considerations of interest at the time.

Independently, therefore, of authority, I should think the general rule should prevail, of construing the contract as to all matters within its provisions, and not introducing an additional implied term.

I have more fully considered the case upon principle, because, although the authorities appear to preponderate, and, indeed, but for some very recent dicta and decisions, to be conclusive in favour of this view, I do not propose to refer to them in detail, as that has been done so fully by the late Lord Chief Justice Bovill in his judgment in the Court below, with which I entirely agree.

The authorities apply to two distinct conditions of things, viz. one where delay has been caused by a breach of some stipulation by the shipowner, and the other where there has been no such breach.

In the former case, except in a few instances where the stipulation is held to be a condition precedent,—*Glaholm* v. *Hays* (1); *Ollive* v. *Booker* (2),—the breach is held to give a claim for damages only, and not to defeat the charterparty: such stipulations, for instance, as, to sail with the first fair wind, or by a particular day.

In such a contract as a charterparty, where so many circumstances may arise at the port of departure to prevent an exact compliance, and which may still not be excused, it would be most unreasonable to enable the freighter, because the bargain turned out an unprofitable one, to throw up the charter for such a default. Accordingly, if the freighter relies upon the breach of some obligation of the shipowner as an answer to an action for not providing a cargo, he must allege that he has lost all benefit of the voyage by the plaintiff's delay. He may fairly say, "You have broken the contract; and I have lost all the intended benefit, by your breach; and I am thus discharged:" see *Freeman* v. *Taylor* (3); *Clipsham* v. *Vertue* (4); *Tarrabochia* v. *Hickie* (5); *Wheeler* v. *Bavidge.* (6)

It should be observed that this loss of benefit to the charterer is a totally different thing from what is set up in the present case, viz. that the delay was unreasonable, and the commercial speculation of the charterparty itself at an end. If there had been any breach by the plaintiff, in not setting sail and proceeding with convenient speed from Liverpool, the charterers might have said their object was defeated, and they were discharged,—not because the delay was of itself an answer to the charterers, but because the breach was made an answer by the delay.

In the present case, the second condition of things exists, and there is no breach of the terms of the charterparty, but the delay itself is made an answer; and the authorities are, I have said, against it. I will only refer to three in particular: but the language of the judges in them is so clear and to the point, that I cannot help referring to it. *Hadley* v. *Clarke* (7) was the case of a

(1) 2 M. & G. 257.
(2) 1 Ex. 416; 17 L. J. (Ex.) 21.
(3) 8 Bing. 124.
(4) 5 Q. B. 265.
(5) 1 H. & N. 183; 29 L. J. (Ex.) 26.
(6) 9 Ex. 668; 23 L. J. (Ex.) 221.
(7) 8 T. R. 259.

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charterparty, perils of the seas being the only exception. The vessel was detained on the voyage from Liverpool to Leghorn by an embargo laid at an intermediate port to which the vessel was driven, for the period of two years. It was contended that the shipowner was excused by this delay not caused by his default; and no one can doubt, I should think, that the commercial speculation entered into by the shipowner and charterer, so far as I understand the meaning of these terms, had long been defeated by such a misadventure. But the language of Mr. Justice Lawrence has been always referred to as the authority on the subject. "The counsel for the defendants," he says (1), "were driven to the necessity of introducing into the contract other terms than those which it contained. They contended that the defendants were only bound to fulfil their engagement within a reasonable time; and then argued that, as the embargo prevented the completion of the contract within a reasonable time, the defendants were absolved from their engagement altogether: but it was incumbent on the defendants, when they entered into this contract, to specify the terms and conditions on which they would engage to carry the plaintiff's goods to Leghorn. They accordingly did express the terms, and absolutely engaged to carry the goods, 'the dangers of the seas only excepted.' That, therefore, is the only excuse which they can make for not performing the contract. If they had intended that they should be excused from any other cause, they should have introduced such an exception into their contract."

There is, no doubt, a distinction of fact between that case and the present one, viz. that, in that case, the cargo remained on board during the whole period of detention, and was, as it were, during all that time detained subject to the charterparty: but this does not appear to make any difference in the principle, since the contract had been acted on in the present case, and the vessel had been prepared, and had on board all the necessary equipments, and had set sail for the voyage.

In the case of *Touteng* v. *Hubbard* (2) the cargo had not been taken on board; and the action was for not providing a cargo at the port of loading, St. Michael's. The charter had the exception

(1) 8 T. R. at p. 267. (2) 3 B. & P. 291.

of restraint of princes; and the vessel had proceeded on the voyage from London, but was detained at Ramsgate by an embargo for six months; and the charterer refused to load a cargo, on the ground that the season for shipping fruit had long passed, and the voyage would be useless and nugatory,—which may be construed as having the same meaning as that the commercial speculation was at an end. The case was ultimately decided upon a question of nationality. The judgment of Lord Alvanley is referred to at some length in the judgment of Lord Chief Justice Bovill in the Court below. (1) I refer to the following passage, because it bears also upon the authority of *Hadley* v. *Clarke* (2): "If, then (3), this had not been the case of a Swedish ship hired by an English merchant, the merchant would have been under the necessity of furnishing the ship with a cargo, if she had arrived at St. Michael's, as soon as she conveniently might after the embargo was taken off, although, by arriving after the fruit season was over, the object of the voyage might be defeated: such is the doctrine in *Hadley* v. *Clarke* (2) and *Blight* v. *Page*. (4) I have no difficulty in subscribing to the doctrine laid down in *Hadley* v. *Clarke* (2), that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only, and that the parties must submit to whatever inconvenience may arise therefrom, unless they have provided against it by the terms of their contract. The object of the voyage might equally have been defeated by the act of God as by the act of the State; as, if the ship had been weather-bound until the fruit season was over; and yet, in that case, the merchant would have been bound to fulfil his contract. The principle of *Hadley* v. *Clarke* (2) is, that an embargo is a circumstance against which it is equally competent to the parties to provide as against the dangers of the seas, and, therefore, if they do not provide against it, they must abide by the consequences of their contract."

I shall only refer to one other case, for the purpose of quoting the opinion of the late Mr. Justice Willes upon the question raised in the present case, *Hurst* v. *Usborne*. (5) In that case there had

(1) Law Rep. 8 C. P. 590.
(2) 8 T. R. 259.
(3) 3 B. & P. at p. 298.
(4) 3 B. & P. 295, n.
(5) 18 C. B. 144; 25 L. J. (C.P.) 209.

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been a detention for 152 days by perils of the seas; and the charterers refused to load, partly on the ground that the vessel had arrived after the time when the export trade usually took place from the port of loading. The following is the judgment of Mr. Justice Willes (1): "As to the other question, whether the construction of the charterparty can be affected by the fact that the particular description of cargo could only be supplied at a certain season of the year,—the answer to that, I apprehend, is, that the charterparty was probably entered into in the hope that the vessel would arrive at Limerick at that time of the year. But the question is, who takes the risk whether she will or not? Why, the person who is to ship the goods takes the risk, unless he stipulates that the other party shall take it. Here, it is not stipulated that the vessel shall arrive at Limerick by any particular day; but only that she shall proceed there with all convenient speed. The owner has performed his contract to proceed with all convenient speed, when he has done all he could, but has been prevented by dangers of the seas."

The case of *Hadley* v. *Clarke* (2) was decided in the year 1799; and it and the cases following upon it have been regarded as authorities ever since, and quoted in all the text-books. They are referred to as authorities by the American as well as English writers. Lord Tenterden, in his work on Shipping, the first edition of which was published in 1802, devotes a paragraph to it as giving the law on the subject (3) and for the American text-books, see Parsons on Shipping, vol. 1, pp. 318 and 330. In the latter passage, the learned writer insists upon the authority of *Hadley* v. *Clarke* (2); and referring to it and other cases in conformity with it in the American Courts, he says: "It is very clear that an embargo, though of an indefinite duration, merely suspends the performance of the contract."

Chancellor Kent also refers to *Hadley* v. *Clarke* (2) as an authority not questioned: Commentaries, vol. 3, pp. 312—346, 10th ed. (4) In the latter page, after referring to matters which put

(1) 18 C. B. at p. 155.

(2) 8 T. R. 259.

(3) See Abbott on Shipping, 5th ed. 429.

(4) 12 ed. p. 224, n. (*d*).

an end to the contract by breaking up the voyage, he adds: "But a temporary impediment of the voyage does not work a dissolution of the charterparty; and an embargo has been held to be such a temporary restraint, even though it be indefinite as to time." (He here refers to *Hadley* v. *Clarke* (1) and the American cases. (2)) "The same construction is given to the legal operation of a hostile blockade or investment of the port of departure upon the contract. It merely suspends the performance of it, and the voyage must be broken up or the completion of it become unlawful before the contract will be dissolved. If the cargo be not of a perishable nature, and can endure the delay, the general principle applies, that nothing but occurrences which prevent absolutely the performance of the contract will dissolve it. The parties must wait until those which merely retard its execution are removed."

But such occurrences would cause unreasonable delay, and destroy the commercial speculation of the contract; still it would subsist.

Against this weight of authority, there are no doubt authorities entitled to great consideration. In the case of *Rankin* v. *Potter* (3), in which the judgment really was that a constructive total loss of the ship was of itself a loss of chartered freight, without notice of abandonment, there are dicta of several of the judges in their opinions delivered to the House of Lords, to the effect that, where a vessel under charter was delayed for an unreasonable time, the charterer was not bound to provide a cargo. Venturing, as I do, to differ from the judgment of the Court below, I must of course venture to differ from those dicta. And it may properly be noticed that those dicta are upon a matter which did not necessarily arise upon the question on which the case was decided, and that they did not in the slightest degree enter into any of the judgments of any of the noble lords who decided the case, and were not noticed by them. Indeed, the judgments given exclude delay from sea-damage as an answer to the obligation of the charterer to load a cargo.

(1) 8 T. R. 259.

(2) *M'Bride* v. *Marine Insurance Co.* 5 Johns. 299, 308; *Bayliss* v. *Fettyplace*, 7 Mass. 325.

(3) Law Rep. 6 H. L. 83.

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The following are the words of Lord Chelmsford, in relation to the right of the shipowner under the charter, where there has been damage requiring reparation (1): "If the sea-damage which the ship sustained in New Zealand was such as to reduce her to a state which rendered her utterly incapable of performing the voyage to England without an expense which no prudent uninsured owner would incur, then the freight was totally lost from that moment, and how the owners chose to deal with the disabled ship afterwards was wholly immaterial. If the damage to the ship had been such that it might have been repaired at a reasonable expense and put into a condition to earn freight, and the shipowners had declined to take this course, they would have lost the freight, not by the perils of the sea, but by their election."

The rule given is a simple one. Repair the damage if it can be done at a reasonable expense, and tender your vessel to the charterer. Not a word about the time which it may require.

The same remark applies to the judgments of Lord Colonsay and Lord Hatherley. (2)

It may also be noticed, with reference to the dicta of the learned judges, that those dicta had reference, in the particular case, not to the necessary delay during the time required for the repair of damage, but to the unusual and unnecessary delay arising from the shipowner, instead of repairing the vessel, making use of it and letting it out for months as a store depôt for coals, in consequence of the want of funds.

Much reliance was placed in the argument upon the case of *Geipel* v. *Smith* (3); and, if that case could be regarded as overruling the authorities referred to, I should have to consider whether I thought myself bound by the earlier authorities or the later case. But that is not the case at all. Not a word is said in that case about overruling any previous authority; on the contrary, my Brother Blackburn says that very different considerations arise in *Hadley* v. *Clarke*. (4) And this was undoubtedly so; for *Geipel* v. *Smith* (3) was not a case of detention by embargo, or delay for necessary repairs, but of the performance of the charter becoming impossible, that is, impossible without liability of for-

(1) Law Rep. 6 H. L. at p. 159.
(2) Law Rep. 6 H. L. at pp. 160, 168.
(3) Law Rep. 7 Q. B. 404.
(4) 8 T. R. 259.

feiture of ship and cargo, by reason of a duly notified and effective blockade at the port of delivery.

It had been held in the case of *Medeiros* v. *Hill* (1) that, where, after the known existence of a blockade, a charterparty was made, to convey a cargo to the blockaded port (the case being clear from the difficulty which might arise if the object was to run the blockade), the existence of the blockade was no answer to the engagement to proceed on the voyage. The object of the merchant in making such a charter was, as stated in the judgment, to be in readiness to enter the port so soon as the blockade was taken off, and so get the advantage of a good market. But, in *Geipel* v. *Smith* (2), the blockade after the making of the charter interposed the impossibility of completing it. The charter contained the exception of restraint of princes.

Now, according to the law of England, if a person engages absolutely to do something, the fact of its becoming impossible or attended with penalties, is in general no answer: *Paradine* v. *Jane* (3), so often referred to, and many subsequent cases. But it would, perhaps, be sufficient to say that such a rule could not apply to a contract between the shipowner and the charterer, when the consequence of carrying the contract into effect would be to expose the cargo as well as the ship to seizure and forfeiture. I take it the ship-owner not only is not bound to run the risk of seizure, by attempting to enter the blockaded port, but would not be justified in doing so without the consent of the charterer. I mean, as between them.

But, independently of that consideration, the rule is founded upon the presumption that, where the engagement is absolute, the party takes upon himself the risk of being able to perform the contract. But that presumption is gone when by the contract itself it appears that the party contracting does not take upon himself that risk; and the exception of restraint of princes in the charterparty negatives the shipowner's having taken upon himself the risk of blockade. That being so, it would indeed have been most unreasonable to hold that the shipowner was bound by such a charterparty, after the impossibility of completing the contract

(1) 8 Bing. 231. (2) Law Rep. 7 Q. B. 404.
(3) Aleyn, 26.

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arose, to load the cargo and carry it to a distant part, and there wait perhaps until it was necessary to return home for stores and provisions, more especially under the particular circumstances appearing in the pleadings in that case.

The cases upon the effect of blockade upon a contract of charterparty are few in our Courts; but the question has arisen in America, and the decision there has been that the effect of a blockade of the port of delivery after the contract, is, to justify the shipowner in throwing up the charter. Kent, vol. 3, p. 346, 10th ed., is very clear in the distinction that, while embargo, or even blockade, at the port of loading is only a temporary impediment, and leaves the contract continuing, a blockade of the port of delivery makes the performance of the contract impossible, and justifies the parties in throwing it up. And he refers to two cases, *The Tutela* (1) and *Scott* v. *Libby*. (2) In the first case, Sir W. Scott seems to think it clear that a blockade of the port of discharge puts an end to a charter previously made; and in the American case, the judgment begins thus: "It appears to be conceded by the counsel on both sides, that, by the blockade of the port of discharge, the charterparty was dissolved, and all right to freight under it gone."

The great loss and inconvenience of equipping and starting upon an enterprise which is at the time impossible, seems a sufficient reason for the distinction. But, without saying that our Courts would at present go that length, I think I may say that the case of *Geipel* v. *Smith* (3) is no authority that detention for necessary reparation justifies the throwing up the charter, or leaves it in force, according as a jury find that the time taken was reasonable or the reverse.

Other cases were referred to in which implied terms had been introduced in express contracts; but I do not think that they throw any light upon the particular question before us. Indeed, it would be impossible to examine all the imperfect analogies which may be put forward; such, for example, as the implied condition that a person who has contracted to do some piece of work which no one else can do,—as, for instance, painting a

(1) 6 Rob. Ad. Rep. 177. (2) 2 Johnson, U. S. Rep. 336.
(3) Law Rep. 7 Q. B. 404.

picture,—shall live long enough to be able to paint it; and other similar instances. No doubt, when the existence of a particular person or thing, or state of things, can be regarded as the very foundation of a particular transaction, it may be implied that, if the foundation fails, the transaction which is founded upon it ceases to be effectual. But, upon this subject I would beg to refer to the clear and comprehensive judgment of my Brother Blackburn in *Taylor* v. *Caldwell*. (1)

For the reasons which I have now given, it appears to me that the charterparty in the present case continued binding upon the charterers; that, consequently, there was no loss of freight by sea perils; and therefore that the defendants are entitled to judgment, which would be a reversal of the judgment already given.

BRAMWELL, B. The first question is, whether the plaintiff could have maintained an action against the charterers for not loading; for, if he could, there certainly has not been a loss of the chartered freight by any of the perils insured against. 1 Q.B.D. 41

In considering this question, the finding of the jury that "the time necessary to get the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers," is all important. I do not think the question could have been left in better terms; but it may be paraphrased or amplified. I understand that the jury have found that the voyage the parties contemplated had become impossible; that a voyage undertaken after the ship was sufficiently repaired would have been a different voyage, not, indeed, different as to the ports of loading and discharge, but different as a different adventure,—a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship, nor the charterers the cargo; a voyage as different as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage.

It is manifest that, if a definite voyage had been contracted for, and became impossible by perils of the seas, that voyage

(1) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

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would have been prevented and the freight to be earned thereby would have been lost by the perils of the seas. The power which undoubtedly would exist to perform, say, an autumn voyage in lieu of a spring voyage, *if both parties were willing*, would be a power to enter into a new agreement, and would no more prevent the loss of the spring voyage and its freight than would the power (which would exist if both parties were willing) to perform a voyage between different ports with a different cargo.

But the defendants say that here the contract was not to perform a definite voyage, but was at some and any future time, however distant, provided it was by no default in the shipowner, and only postponed by perils of the seas, to carry a cargo of rails from Newport to San Francisco; and that, no matter at what distance of time, at what loss to the shipowner, whatever might be the ship's engagements, however freights might have risen, or seamen's wages, though the voyage at the time when the ship was ready might be twice as dangerous, and possibly twice as long, from fogs, ice, and other perils, though war might have broken out meanwhile between the country to whose port she was to sail and some other, still she was bound to take and had the right to demand the cargo of the shippers; who in like way had a right to have carried and were bound to find the agreed cargo, or, if that had been sent on already, a cargo of the same description, no matter at what loss to them, and however useless the transport of the goods might be to them. This is so inconvenient, that, though fully impressed with the considerations so forcibly put by Mr. Aspland, and retaining the opinion I expressed in *Tarrabochia* v. *Hickie* (1), I think that, unless the rules of law prohibit it, we ought to hold the contrary.

The question turns on the construction and effect of the charter. By it the vessel is to sail to Newport with all possible dispatch, perils of the seas excepted. It is said this constitutes the only agreement as to time, and, provided all possible dispatch is used, it matters not when she arrives at Newport. I am of a different opinion. If this charterparty be read as a charter for a definite voyage or adventure, then it follows that there is *necessarily* an implied condition that the ship shall arrive at Newport in time for

(1) 1 H. & N. 183; 29 L. J. (Ex.) 26.

it. Thus, if a ship was chartered to go from Newport to St. Michael's in terms in time for the fruit season, and take coals out and bring fruit home, it would follow, notwithstanding the opinion expressed in *Touteng* v. *Hubbard* (1), on which I will remark afterwards, that, if she did not get to Newport in time to get to St. Michael's for the fruit season, the charterer would not be bound to load at Newport, though she had used all possible dispatch to get there, and though there was an exception of perils of the seas.

The two stipulations, to use all possible dispatch, and to arrive in time for the voyage, are not repugnant; nor is either superfluous or useless. The shipowner, in the case put, expressly agrees to use all possible dispatch: that is not a condition precedent; the sole remedy for and right consequent on the breach of it is an action. He also impliedly agrees that the ship shall arrive in time for the voyage: that *is* a condition precedent as well as an agreement; and its non-performance not only gives the charterer a cause of action, but also releases him. Of course, if these stipulations, owing to excepted perils, are not performed, there is no cause of action, but there is the same release of the charterer. The same reasoning would apply if the terms were, to "use all possible dispatch, and further, and as a condition precedent, to be ready at the port of loading on June 1st." That reasoning also applies to the present case. If the charter be read, as for a voyage or adventure not precisely defined by time or otherwise, but still for a particular voyage, arrival at Newport in time for it is necessarily a condition precedent. It seems to me it must be so read. I should say reason and good sense require it. The difficulty is supposed to be that there is some rule of law to the contrary. This I cannot see; and it seems to me that, in this case, the shipowner undertook to use all possible dispatch to arrive at the port of loading, and also agreed that the ship should arrive there "at such a time that in a commercial sense the commercial speculation entered into by the shipowner and charterers should not be at an end, but in existence." That latter agreement is also a condition precedent. Not arriving at such a time puts an end to the contract; though, as it arises from an excepted peril, it gives no cause of action.

The same result is arrived at by what is the same argument

(1) 3 B. & P. 291.

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differently put. Where no time is named for the doing of anything, the law attaches a reasonable time. Now, let us suppose this charterparty had said nothing about arriving with all possible dispatch. In that case, had the ship not arrived at Newport in a reasonable time, owing to the default of the shipowner, the charterers would have had a right of action against the owner, and would have had a right to withdraw from the contract. It is impossible to hold that, in that case, the owner would have a right to say, "I came a year after the time I might have come, because meanwhile I have been profitably employing my ship: you must load me, and bring your action for damages." The charterers would be discharged, because the implied condition to arrive in a reasonable time was not performed. Now, let us suppose the charter contains, as here, that the ship shall arrive with all possible dispatch,—I ask again, is that so inconsistent with or repugnant to a further condition that at all events she shall arrive within a reasonable time? or is that so needless a condition that it is not to be implied? I say certainly not. I must repeat the foregoing reasoning. Let us suppose them both expressed, and it will be seen they are not inconsistent nor needless. Thus, I will use all possible dispatch to get the ship to Newport, but at all events she shall arrive in a reasonable time for the adventure contemplated. I hold, therefore, that the implied condition of a reasonable time exists in this charter. Now, what is the effect of the exception of perils of the seas, and of delay being caused thereby? Suppose it was not there, and not implied, the shipowner would be subject to an action for not arriving in a reasonable time, and the charterers would be discharged. Mr. Benjamin says the exception would be implied. How that is, it is not necessary to discuss, as the words are there: but, if it is so, it is remarkable as shewing what must be implied from the necessity of the case.

The words are there. What is their effect? I think this: they excuse the shipowner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say *he* is, I think *both* are. The condition precedent has not been performed, but by default of neither. It is as though the charter were conditional on peace being made between countries A. and B., and it was not; or as though the charterer agreed to load a cargo of coals, strike of pitmen excepted. If a strike of

probably long duration began, he would be excused from putting the coals on board, and would have no right to call on the shipowner to wait till the strike was over. The shipowner would be excused from keeping his ship waiting, and have no right to call on the charterer to load at a future time. This seems in accordance with general principles. The exception is an excuse for him who is to do the act, and operates to save him from an action and make his non-performance not a breach of contract, but does not operate to take away the right the other party would have had, if the non-performance had been a breach of contract, to retire from the engagement: and, if one party may, so may the other. Thus, A. enters the service of B., and is ill and cannot perform his work. No action will lie against him; but B. may hire a fresh servant, and not wait his recovery, if his illness would put an end, in a business sense, to their business engagement, and would frustrate the object of that engagement: a short illness would not suffice, if consistent with the object they had in view. So, if A. engages B. to make a drawing, say, of some present event, for an illustrated paper, and B. is attacked with blindness which will disable him for six months, it cannot be doubted that, though A. could maintain no action against B., he might procure some one else to make the drawing. So, of an engagement to write a book, and insanity of the intended author. So, of the case I have put, of an exception of a strike of pitmen.

There is, then, a condition precedent that the vessel shall arrive in a reasonable time. On failure of this, the contract is at an end and the charterers discharged, though they have no cause of action, as the failure arose from an excepted peril. The same result follows, then, whether the implied condition is treated as one that the vessel shall arrive in time for that adventure, or one that it shall arrive in a reasonable time, that time being, in time for the adventure contemplated. And in either case, as in the express cases supposed, and in the analogous cases put, non-arrival and incapacity by that time ends the contract; the principle being, that, though non-performance of a condition may be excused, it does not take away the right to rescind from him for whose benefit the condition was introduced.

On these grounds, I think that, in reason, in principle, and for

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the convenience of both parties, it ought to be held in this case that the charterers were, on the finding of the jury, discharged.

It remains to examine the authorities. The first in date relied on by the defendants is *Hadley* v. *Clarke*. (1) Now, it may safely be said that there the question was wholly different from the present. There was no question in that case as to the performance of a condition precedent to be ready at a certain or within a reasonable time, or such a time that the voyage in question, the adventure, should be accomplished and not frustrated. That condition had been performed: the ship had loaded and sailed in due time. The plaintiff had had a part of the benefit intended. The defendant had in justice earned part of his freight. Had the plaintiff demanded his goods at Falmouth, he ought to have paid something for their carriage there. He could not, therefore, well have said that he would not go on with the adventure, but undo it. But, if I am right, unless both could, neither could. Further, in that case there was no finding, nor anything equivalent to a finding, that the objects of the parties were frustrated. This case is therefore in every way distinguishable.

Then, there is the case of *Touteng* v. *Hubbard*. (2) The opinion there expressed was obiter,—of weight, no doubt; but not of the same weight it would have been had it been the ratio decidendi. I cannot think that it would have been so held, had it been necessary to act on it. To hold that a charterer is bound to furnish a cargo of fruit at a time of year when there is no fruit,—at a time of year different to what he and the shipowner must have contemplated, the change to that time being no fault of his, but the misfortune at best of the shipowner,—is so extravagant, when the consequences become apparent, that it could not be. Suppose a charter to fetch a cargo of ice from Norway, entered into at such a time that the vessel would reach its destination, with reasonable dispatch, in February, when there was ice, and bring it back in June, when ice was wanted, and by perils of the seas it could not get to Norway till the ice was melted, nor return till after ice was of no value: can it be that the charterer would be bound to load? that he had agreed in those events to do so?

Another case is *Hurst* v. *Usborne*. (3) That is a case of which,

(1) 8 T. R. 259. (2) 3 B. & P. 291.
(3) 18 C. B. 144; 25 L. J. (C.P.) 209.

if I knew no more than I learn from the books, I should say it did not decide the question we have before us. It is true that the report in the Law Journal (1), as Mr. Aspland pointed out, says that Mr. Justice Cresswell said he knew of no time the shipowner was bound to, except to use reasonable dispatch. Still, I cannot see from the reports that the point now before us was presented to the judges in that case. My Brother Blackburn, who was counsel in the cause, says it was intended to raise this point by the evidence that was rejected at nisi prius. No doubt, therefore, that was so; but I cannot think it so understood by the Court. I see no adjudication on it. Mr. Butt pointed out that the charter was for barley *or other lawful merchandise.* Even if for barley only, it does not appear that barley might not have been stored at Limerick, nor that barley from Limerick arriving in England at the time it would, had the defendant loaded, would not have been as valuable as barley arriving earlier. I cannot but think it was a hasty decision: a rule was refused; and certainly one would think, after the argument we have heard, that the matter was worth discussing. At the same time, its tendency is favorable to the defendants. I think it is unsatisfactory, and, if a decision on the question now before us, wrong. Mr. Justice Willes did not seem to be of opinion that the law was as he is supposed to have laid it down in that case: see his judgment in *M'Andrew* v. *Chapple* (2), where, indeed, there had been a breach of his contract by the shipowner; but the observations are general. I may also properly refer to the opinions, if not of myself, of my Brothers Blackburn and Brett in *Rankin* v. *Potter.* (3) They undoubtedly assume the law to be as the plaintiff contends.

There is also *Geipel* v. *Smith* (4), nearly if not quite in point. The shipowner there was excused, not merely for refusing to take a cargo to a port which became blockaded after the charter, but also in effect for refusing to do so after the blockade was removed. Restraint of princes not only excused, but discharged him. The same, no doubt, would have been held as to the charterers.

Then, there are the cases which hold that, where the shipowner has not merely broken his contract, but so broken it that the condition precedent is not performed, the charterer is discharged: see

(1) 25 L. J. (C.P.) at p. 211.
(2) Law Rep. 1 C. P. 643.
(3) Law Rep. 6 H. L. 83.
(4) Law Rep. 7 Q. B. 404.

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Freeman v. *Taylor*. (1) Why? Not merely because the contract is broken. If it is not a condition precedent, what matters it whether it is unperformed with or without excuse? Not arriving with due diligence, or at a day named, is the subject of a cross action only. But, not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract, but discharges the charterer. And so it should, though he has such an excuse that no action lies. *Taylor* v. *Caldwell* (2) is a strong authority in the same direction. I cannot but think, then, that the weight of authority, as might be expected, is on the side of reason and convenience.

On the other question, viz. whether, though the charterers by perils insured against had a right to refuse to load the cargo, there has been a loss of freight by perils of the seas,—I am of opinion there has been.

It was argued that the doctrine of Causa proxima, non remota, spectetur, applies; and that the proximate cause of the loss of the freight here was, the refusal of the charterers to load. But, if I am right, that the voyage, the adventure, was frustrated by perils of the seas, both parties were discharged, and a loading of cargo in August would have been a new adventure, a new agreement. But, even if not, the maxim does not apply. The perils of the seas do not cause something which causes something else. The freight is lost *unless* the charterers choose to go on. They do not. In the case of goods carried part of the voyage, and the ship lost, but the goods saved, the shipowner may carry them on if he chooses, but is not bound. Suppose he does not, his freight is lost. So, if he does not choose to repair a vessel which remains in specie, but is a constructive total loss.

For these reasons, I think the judgment should be affirmed.

My Brothers Blackburn, Mellor, and Amphlett agree in this judgment; as does my Brother Lush, who, however, heard part only of the argument.

Judgment affirmed.

Attorney for plaintiffs: *Norris.*

Attorneys for defendants: *Field, Roscoe, Field, Francis, & Osbaldiston, for Bateson, Robinson, & Morris, Liverpool.*

(1) 8 Bing. 124. (2) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

GOLD *v.* TURNER. 1874

Prohibition—Mayor's Court, London—Part of Cause of Action arising out of the Jurisdiction. Nov. 21.

Orders were given for goods at Poplar to be delivered to a carrier named by the buyer and to be paid by him. The goods were received by the carrier (on delivery orders handed to him by the seller in the city of London) partly within and partly without the city. An action having been brought for the price in the Lord Mayor's Court :—

Held, that part of the cause of action arose out of the jurisdiction of the Court, and therefore the defendant was entitled to a prohibition.

ACTION in the Mayor's Court, London, for 30*l.* 14*s.* 1*d.*, for goods sold and delivered by the plaintiff to the defendant.

Gore, on a former day obtained a rule nisi for a prohibition, with costs, to be paid by the plaintiff's attorneys, upon an affidavit which stated that the plaintiff is a wholesale tea-dealer carrying on business at 21 and 22, Lime Street, in the city of London; that the alleged cause of action did not arise either wholly or in part within the jurisdiction of the Mayor's Court, London; that the orders for the goods the subject of this action were (with the exception of one for a half-chest of tea of the value of about 3*l.*) given to the plaintiff's traveller at 1, Morris Road, Poplar, in the county of Middlesex, and the whole of the goods were delivered there.

Grantham shewed cause, upon an affidavit that the defendant, when the goods were sold and delivered to him, resided and carried on business as a retail grocer at Morris Road, Poplar; that the orders for the goods were given by the defendant to the plaintiff's traveller at that place, and the defendant at the same time directed the traveller to send the goods by Pickford & Co., the carriers, which was done by delivering to them orders for the same upon certain wharves or warehouses, and that the defendant paid them the carriage; that the delivery orders for the goods were, in the usual course of business, delivered in the city of London to Pickford & Co., some in the counting-house of the plaintiff and others at Pickford & Co.'s branch-office in St. Dunstan's Hill, City; that the greater part of the goods were actually

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delivered to the carriers at the plaintiff's counting-house, at the Red Lion Wharf, Thames Street, City, and at certain warehouses in Cutler Street, Bishopsgate Street, City; that only a small portion was obtained by the carriers from Hay's Wharf, Tooley Street, Borough, out of the jurisdiction of the Mayor's Court; and that since the commencement of the action the defendant called at the office of the plaintiff's attorneys, admitted the receipt of the goods, and promised to pay for them.

The delivery orders for the goods having been handed to the carriers (to whom the goods were by the terms of the contract to be delivered, and who were to be paid by the defendant, and who therefore were his agents,) within the city of London, a cause of action arose within the jurisdiction of the Mayor's Court.

[LORD COLERIDGE, C.J. Some of the goods were collected by the carriers in Tooley Street, which is out of the jurisdiction.]

That might be an answer as to part of the claim. The delivery orders for the whole of the goods were handed to the carriers within the jurisdiction.

[LORD COLERIDGE, C.J. If any part of the cause of action arises out of the city of London, that is ground for a prohibition.]

There was an acknowledgment by the defendant within the city that the whole of the goods had been received, and a promise to pay.

[BRETT, J. If that is relied on as an account stated, the plaintiff is met by this difficulty, that it was made after the commencement of the action.]

The granting of a prohibition is not of right; and, where the greater part of the demand clearly arises within the city, the Court may in its discretion withhold it. At all events, this is not a case for costs against the plaintiff's attorneys.

Gore, in support of the rule. The orders for the goods were given at Poplar. A material part of the cause of action, therefore, arose out of the jurisdiction of the Mayor's Court.

[BRETT, J. Throw out of consideration the orders given at Poplar. The goods were directed to be handed to carriers in London who were to be paid by the defendant. The delivery orders for the goods were all handed to the carriers within the city, and the bulk of the goods were collected by them within the

city; and there was a subsequent admission by the defendant within the city of the receipt of the goods.]

The acceptance of the goods by the buyer is not that from which a contract is to be implied; it is a mere compliance with a previous contract,—the giving of the orders (which took place at Poplar), including of course the price.

LORD COLERIDGE, C.J. I am of opinion that the rule must be made absolute. As to part of the cause of action, Mr. Grantham's own affidavit puts him out of Court. To entitle a plaintiff to sue in the Lord Mayor's Court, the *whole* of the cause of action must have arisen within the jurisdiction of that Court. Some of the goods here were received by the carriers in Tooley Street, which is out of the city. That is enough for the prohibition to go. A further point, however, is raised, viz. whether some part of all causes of action did not arise out of the jurisdiction. Now, I agree with Mr. Gore, that the action could not be maintained without proof of a material part of the cause of action which arose out of the jurisdiction, viz. the orders for the goods which were given at Poplar. In respect of the whole of the goods, therefore, there was some part of the cause of action which arose out of the jurisdiction. There remains, then, the further question whether or not the costs of the rule should be paid by the plaintiff's attorneys. Now, the reason why that course was adopted by the Court was, that some attorneys, deliberately setting themselves against the decisions of the Court, for their own profit, and not with a view to the interest of their clients, have persisted in suing in the Mayor's Court in respect of causes of action which were wholly out of the jurisdiction of that Court. To check that growing evil, the Court determined to visit personally with costs the persons so improperly acting. In the present case, however, it may fairly be assumed that the attorneys have merely mistaken the law in a case which certainly was not quite free from doubt. Some argument was required to satisfy the Court that the question of jurisdiction applied to *all* the causes of action. Without, therefore, saying that we will spare the attorneys if such a case arises again, it is enough to say that here the matter was suf-

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ficiently doubtful to excuse the course they pursued. The rule will be absolute with costs in the usual way.

BRETT, J. I am of the same opinion. I at first entertained some doubt whether, where the order for the goods is given outside the city, to be delivered to a carrier (named and to be paid by the buyer) within the city, and the goods are so delivered, the cause of action may not be said to have arisen within the jurisdiction of the Mayor's Court. But, on consideration, I think Mr. Gore has removed that doubt by saying that, where the order is given outside the city, inasmuch as that includes the price, a part at all events of the cause of action clearly arises without the jurisdiction. The plaintiff here could not succeed without proving a part of the cause of action arising at Poplar. It cannot therefore be said that the whole of the cause of action arose within the jurisdiction of the Mayor's Court. Prohibition, therefore, lies even although only a small portion of the goods were collected outside the city.

GROVE, J., concurred.

Rule absolute.

Attorneys for plaintiff: *Waller & Handson.*
Attorney for defendant: *Henry Aird.*

Nov. 25.

LAURIE *v.* WILSON.

Practice—Costs—Counsel's Fees—Refreshers.

In the Court of Common Pleas the rule as to the allowance of fees as refreshers, on taxation of costs, will in future be the same as in the Queen's Bench and Exchequer, viz. that such fees when proper may be allowed.

A RULE nisi had been obtained on behalf of the plaintiff for a review of the taxation of costs in this case. The Master had disallowed refreshers paid to counsel, and the application was that he might review his taxation in this respect.

Sutton shewed cause.

Butt, Q.C., in support of the rule.

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LORD COLERIDGE, C.J., stated that the Master reported that the fees had been disallowed in pursuance of the general practice of the Court theretofore, which, differing from that of the Queen's Bench and Exchequer, had been never to allow fees paid as refreshers: that the Court for the future intended that their practice should be assimilated to that of the other Courts, and consequently the matter would be referred back to the Master, to exercise his discretion on the question whether in this particular case the refreshers ought to be allowed.

Rule absolute.

Attorneys for plaintiff: *Freshfield & Williams.*
Attorneys for defendant: *Pritchard & Sons.*

END OF MICHAELMAS TERM, 1874.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

HILARY TERM, XXXVIII VICTORIA.

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Jan. 11.

HALL *v.* LEVY.

Pleading—Judgment in previous Action—Estoppel—Release—Condition subsequent—Composition Deed.

To a declaration on a bill of exchange by the plaintiff, as indorsee, the defendant, the acceptor, pleaded by way of estoppel, setting out the proceedings in a former action by the plaintiff upon the same bill of exchange, in which former action the defendant had pleaded to the further maintenance a composition deed executed after action, by which the defendant's creditors, including the plaintiff, agreed to release him from their debts in consideration of his agreement to pay a composition by two instalments, with a proviso that, on default in payment of the composition, the release was to become null and void. The plea then set forth that the plaintiff had replied to such plea in the first action the non-payment of the first instalment under the deed, and that the defendant had rejoined, on equitable grounds, a mistake in non-payment on the proper day and a subsequent tender; that, thereupon, the plaintiff struck out the replication, confessed the plea, and taxed his costs under the rule of Trinity Term, 1853, which were paid, and that such determination of the first action estopped the plaintiff from bringing the present action. Replication that after the proceedings in the first action, and before the present action, a second instalment under the deed became payable; that the defendant had made default in payment of it, and that thereby the release in the deed became null and void:—

Held, that the replication was good.

DEMURRER to a replication. The substance of the pleadings appears from the head-note and judgment.

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Arthur Wilson (*Firth* with him), in support of the demurrer. The rule of law is, that in respect of one and the same cause of action there can be but one final judgment. The plaintiff having confessed the plea in the first action, and obtained his costs, that action was finally determined; and unless it can be said that a fresh cause of action has since arisen, he cannot be entitled to succeed: *Lord Ferrar's Case* (1); *Outram* v. *Morewood* (2); *Overton* v. *Harvey* (3); *Kitchen* v. *Campbell* (4); *Belshaw* v. *Bush*. (5)

[KEATING, J. It is no doubt true that when the very same subject-matter has been determined in a previous action, the plaintiff cannot sue again; but the question is, what is the same subject-matter?]

It is the same subject-matter when the same evidence is necessary to prove the cause of action. All the authorities shew that if there has once been a judgment with respect to a cause of action, no matter subsequent can enable a fresh action to be brought in respect of it. So in a case of personal injuries, it has been held when there has once been a recovery of damages, or other determination of an action in respect of the injury, no subsequent circumstances enhancing the amount of damage done can ever give a fresh right of action: *Read* v. *Great Eastern Ry. Co.* (6); *Whitehouse* v. *Fellows* (7); *Newington* v. *Levy*. (8) The release in the composition deed destroyed the original debt. It cannot be read as a covenant not to sue, or as a release defeasible upon a condition subsequent. A right of action once suspended is gone for ever. The release cannot be treated as a covenant not to sue, for the ground on which a covenant not to sue may be pleaded as a release is to avoid circuity of action, since it would be absurd that the plaintiff should be allowed to recover the same amount of damages as he would be obliged to pay back again in an action on the covenant not to sue. The same reasoning does not apply to a covenant not to sue for a limited time. The action may be brought only a day before the expiration of the time; clearly, in such a case, the defendant could not recover back the

(1) 6 Rep. 70.
(2) 3 East, 346.
(3) 9 C. B. 324; 19 L. J. (C.P.) 256.
(4) 3 Wils. 304.
(5) 11 C. B. 191; 22 L. J. (C.P.) 24.
(6) Law Rep. 3 Q. B. 555.
(7) 10 C. B. (N.S.) 765; 30 L. J. (C.P.) 305.
(8) Law Rep. 5 C. P. 607; Law Rep. 6 C. P. 180.

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full amount. If this be so, the reasoning of Blackburn, J., in *Newington* v. *Levy* (1) is inapplicable. [He cited on this point *Ford* v. *Beech* (2); *Gibbons* v. *Vouillon* (3); *Slater* v. *Jones* (4); *Edwards* v. *Coombe* (5); *Newell* v. *Van Praagh.* (6)]

R. Vaughan Williams, in support of the replication. There is nothing involved in the determination of the former action to estop the plaintiff from recovering in the present. The determination of the former action was founded upon a confession that the plaintiff was not at that time entitled further to maintain the action. That is altogether different from a judgment on the merits. Moreover, it appears on the face of the judgment that it is so. It is otherwise when on a plea to the further maintenance it appears that the plaintiff will never be entitled to proceed again. There is nothing in the maintenance of the present action in the least inconsistent with the doctrine that a cause of action once suspended is gone for ever. The effect of the confession of the plea in the former action is only to shew that at that time the plaintiff was not entitled further to maintain that action. The effect of the judgment in *Newington* v. *Levy* (7) is only that the confession applied to the time at which it was made, not to the date of the plea. The effect of the default in payment of the composition is to restore the state of things which existed before. With regard to the effect of the release, a condition precedent to take effect at a time subsequent is a different thing from a condition subsequent. The proper construction of the release is, that it is a release defeasible on a condition subsequent, as Bramwell, B., held in *Newington* v. *Levy.* (7) It is not a release to arise on a condition precedent, as the defendant's contention would make it.

Arthur Wilson, in reply.

Cur. adv. vult.

Jan. 11. The judgment of the Court (Keating and Denman, JJ.,) was delivered by

KEATING, J. This was an action upon a bill of exchange for

(1) Law Rep. 6 C. P. at p. 191.
(2) 11 Q. B. 852.
(3) 8 C. B. 483; 19 L. J. (C.P.) 74.
(4) Law Rep. 8 Ex. 186.
(5) Law Rep. 7 C. P. 519.
(6) Law Rep. 9 C. P. 96.
(7) Law Rep. 5 C. P. 607; Law Rep. 6 C. P. 180.

158*l.* 15*s.* 10*d.*, at four months, by the plaintiff as indorsee against the defendant as acceptor. There was a second count, for non-payment of instalments under a composition deed to the plaintiff as a creditor in respect of a bill of like amount.

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The defendant pleaded to the whole declaration, by way of estoppel, setting out the proceedings in a former action by the plaintiff against the defendant upon the bill now declared upon, in which former action the defendant had pleaded to the further maintenance, a composition deed under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), executed after action brought, by which the defendant's creditors (including the plaintiff), agreed to release him from their debts (including the bill in question), in consideration of his agreement to pay 1*s.* in the pound, by instalments of 6*d.* each, with the usual proviso that, on default in payment of the composition, then the release was to become null and void, and the creditors were not to be bound by any of the covenants therein contained. There was an averment of performance of conditions, so as to make the deed a bar to the further maintenance of the action. The plea then set forth that the plaintiff had replied to such plea in the first action the non-payment of the first instalment under the deed, and that the defendant had rejoined, on equitable grounds, a mistake in non-payment on the proper day, and a subsequent tender; that thereupon the plaintiff struck out the replication, confessed the plea, and taxed his costs under the rule of Court (1), which were paid; and that such determination of such first action estopped the plaintiff from bringing the present action.

To this plea the plaintiff replied, that, after the confession, taxation, and payment of the costs in the former action as alleged in the plea, and before the commencement of the present action, another instalment under the deed had become payable; that the defendant had made default in its payment; and that thereby the release in the deed became null and void.

To this replication there was a demurrer; and the question is whether it was an answer to the plea.

The case was argued before my Brother Denman and myself during last Michaelmas Term, by Mr. Vaughan Williams for the

(1) Reg. Gen. Trinity Term, 1853, ss. 22, 23.

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plaintiff and Mr. Arthur Wilson for the defendant; and we took time to consider our judgment.

We are of opinion that the replication is good. In the case of *Newington* v. *Levy* (1), a case much discussed by the counsel on both sides, a former action had been brought upon the same bill of exchange upon which the plaintiff sued in that action. The first action had been disposed of in a manner similar to that described in the plea in the present case. The plaintiff then brought the second action on the same bill; and, to a plea setting out the proceedings in the first action, and relying on them as an estoppel, the plaintiff replied the default by non-payment of the *first* instalment under the deed, which had accrued before the confession of the plea in such first action. The Court held the replication to be bad, upon the ground that the confession in the first action was final as to everything that had been or *might have been* controverted in such action, and that the same question could not be raised in a second action. The case was taken to the Exchequer Chamber, where the judgment was affirmed, and on the same grounds.

In the present case, however, the replication relies on a default which did not exist at the time of the first action, or until after its termination. It could not, therefore, have been in controversy in such action, and consequently there can be no estoppel. In the present action we hold the replication to be a good answer to the defendant's plea. We quite agree with the judgments of Bramwell, B., and Blackburn, J., in *Newington* v. *Levy* (2) in the Exchequer Chamber, and think it would be most unjust if a debtor could be allowed to take advantage of a release only granted on a condition which he has not performed.

The judgment must be for the plaintiff.

Judgment for the plaintiff.

Attorney for plaintiff: *J. C. Hall.*

Attorneys for defendant: *Crook & Smith.*

(1) Law Rep. 5 C. P. 607; Law Rep. 6 C. P. 180.

(2) Law Rep. 6 C. P. at pp. 189, 191.

OGG AND ANOTHER *v.* SHUTER.

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Jan. 22.

Sale of Goods—Passing of Property—Cash against Bill of Lading—Bill of Lading Deliverable to Order of Vendor—"Free on Board"—Goods shipped in Purchaser's Sacks—Part Payment—Intention.

By a contract for the sale of potatoes they were to be shipped by the vendor for London, free on board at Dunkirk, and the price was to be paid in cash against bill of lading. It was also stipulated that there should be a part payment of the price by way of earnest. The potatoes were shipped under the contract in sacks provided by the purchaser, and were made by the bill of lading deliverable to the order of the vendor. The purchaser made a part payment of the price, in pursuance of the contract, and the vendor sent a draft for the balance of the purchase-money to his agent in England with the bill of lading which he indorsed to such agent for presentation to the purchaser. Upon the arrival of the ship at her destination, the vendor's agent presented the draft to the purchaser for acceptance, but the purchaser being under the impression that the shipment was short by sixteen sacks would not accept at once for the full amount, but offered to accept as soon as the vessel should be unloaded if the quantity was correct, or to pay the balance at once, deducting for the deficiency. The vendor's agent insisted on immediate acceptance for the full amount and, the purchaser not immediately accepting, sold the potatoes. In an action by the purchaser against the vendor's agent for a conversion of the potatoes:—

Held, that the property in the goods had passed to the plaintiff, and that he was entitled to maintain the action.

Declaration for a conversion of 251 sacks of potatoes.

Pleas: Not guilty; and that the goods were not the plaintiffs' as alleged. Issues thereon.

At the trial, before Keating, J., the facts were as follows:—The plaintiffs had, in January, 1874, entered into a contract with Mons. Paresys Loutré, of Merville, in France, for the purchase from him of potatoes. The contract was contained in several letters between the purchasers and the vendor. The terms ultimately agreed on were as follows, viz. for twenty tons of potatoes at 84 francs per 1000 kilogrammes, deliverable in the course of the current month free on board of a ship at Dunkirk, payment to be by cash against bill of lading signed by the captain. It was also stipulated that there should be a part payment in earnest of the bargain.

The plaintiffs paid 30*l.* in part payment, and potatoes were shipped under the contract on board the ship *Blonde*, at Dunkirk, for London, in sacks sent over for the purpose by the plaintiffs,

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under a bill of lading which made them deliverable to order. The vendor indorsed the bill of lading to the defendant, and instructed him to present the draft for the balance of the purchase-money to the plaintiffs against the bill of lading. On the arrival of the *Blonde* in the Thames, and before her cargo was discharged, it was erroneously supposed by the plaintiffs, for some reason or other which did not very clearly appear, that the shipment was sixteen sacks short, and, consequently, when the draft was presented by the defendant they declined to accept for the full amount on the ground that the shipment was short, but stated that if on discharge of the cargo it proved that the full quantity was on board they would immediately accept the draft, or, if preferred, that they were ready to pay the amount of the purchase-money due, after deducting for the sixteen sacks, immediately. The defendant said that if the shipment proved short it would be made good, but he would be satisfied with nothing but immediate acceptance of the draft, and on the plaintiffs not accepting, sold the potatoes forthwith; the price of potatoes having risen considerably in the meantime. It appeared when the ship was unloaded that the full quantity was on board, and the plaintiffs then claimed the goods, and were ready to pay the price, but the goods were delivered to the defendant's vendee.

On these facts, the verdict by consent was entered for the plaintiffs for 32*l.* 17*s.* 6*d.* damages, leave being reserved to the defendant to move to enter a verdict, on the ground that neither the property nor the possession of the goods had passed to the plaintiffs, the Court to have power to draw inferences of fact.

A rule nisi had been obtained accordingly.

Holl shewed cause. He contended that the question whether the property passed depended on the intention of the parties to be gathered from the terms of the contract and other circumstances, and that the expression "free on board" in the contract, the part payment, and the fact that the potatoes were put in the plaintiffs' sacks, were sufficient to shew that the property had passed. He cited *Browne* v. *Hare* (1); *Joyce* v. *Swann* (2); *Wilmshurst* v.

(1) 3 H. & N. 484; 4 H. & N. 822; 27 L. J. (Ex.) 372; 29 L. J. (Ex.) 6.
(2) 17 C. B. (N.S.) 84.

Bowker (1); *Moakes* v. *Nicolson* (2); *Bishop* v. *Shillito* (3); *Aldridge* v. *Johnson* (4); *Langton* v. *Higgins* (5); *Dutton* v. *Solomonson* (6); *Fragano* v. *Long* (7); *Wait* v. *Baker* (8); *Shephard* v. *Harrison* (9); *Martindale* v. *Smith.* (10) He also contended that trover would lie, on the ground that the tortious sale of the potatoes determined any right of lien the vendor might have. He cited on this point *Cooper* v. *Willomatt* (11); *Johnson* v. *Stear.* (12)

Willis supported the rule. He contended that the stipulation for cash against bill of lading, and the fact that the bill of lading made the goods deliverable to the order of the vendor were conclusive to shew that the property was not intended to pass. He cited, in addition to the cases already cited, *Paynter* v. *James* (13); *Brandt* v. *Bowlby* (14); *Milgate* v. *Kebble* (15); *Lord* v. *Price.* (16) He also contended that in order to maintain trover the plaintiffs must be entitled to actual possession of the goods as well as the property in them; and that the vendor's lien still existing, the action was not maintainable.

Cur. adv. vult.

Jan. 22. LORD COLERIDGE, C.J. The facts in this case are shortly these. There is a contract for the sale of potatoes by the person whom the defendant represents to the plaintiffs, to be delivered free on board within a month, and payment is to be by cash against bill of lading. The goods are shipped in the plaintiffs' sacks, under a bill of lading, which is indorsed to the defendant. A part payment of 30*l.* is made. The action being for a conversion of the potatoes by the defendant, it was objected by his counsel that the property in the potatoes had never passed to the plaintiffs. It was contended on the other side that the property had passed, and that the vendor had merely reserved a lien on the goods for the price. My Brother Keating directed a verdict

(1) 7 M. & G. 882.
(2) 19 C. B. (N.S.) 290; 34 L. J. (C.P.) 273.
(3) 2 B. & Ald. 329, n.
(4) 7 E. & B. 885; 26 L. J. (Q.B.) 296.
(5) 4 H. & N. 402; 28 L. J. (Ex.) 252.
(6) 3 B. & P. 582.
(7) 4 B. & C. 219.
(8) 2 Ex. 1; 17 L. J. (Ex.) 307.
(9) Law Rep. 4 Q. B. 196, 493; Law Rep. 5 H. L. 116.
(10) 1 Q. B. 389.
(11) 1 C. B. 672.
(12) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.
(13) Law Rep. 2 C. P. 348.
(14) 2 B. & Ad. 932.
(15) 3 M. & G. 100.
(16) Law Rep. 9 Ex. 54.

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for the plaintiffs, reserving leave to the defendant to move. I am of opinion that his ruling was correct. The result of the decisions which were cited is, that the question whether the property in goods has passed under a contract of sale is a question of intention to be gathered from all the circumstances, the expressions made use of in the contract, and also the surrounding circumstances. In the case of a specific chattel, the rule is that the sale passes the property. So also the general rule, as laid down in several cases, is that, in the absence of countervailing circumstances, the specific appropriation of goods to the contract, by their being placed in vessels or receptacles provided by the purchasers, would pass the property. Here the potatoes were separated from a larger bulk, and placed in the plaintiffs' sacks, which had been sent over for the purpose. In addition to this very strong fact there is also the expression "free on board" in the contract, which has in previous cases been relied on, not as absolutely conclusive to shew that the property passed, but as a strong element to be considered in favour of that conclusion. There is also the further fact that there was a part payment of 30*l*. All these are very strong circumstances to shew that the property passed; but it is contended, on the other hand, that the expression, "cash against bill of lading," in the contract, is of itself conclusive to ascertain the intention of the vendor; that, the bill of lading being the indicium of property, the fact that the purchaser was not to receive it until he paid the price unmistakeably indicated the intention that till then the property should not pass. In support of this view a great many cases and dicta of judges were cited. These authorities appear to me to go no further than the conclusion that, in the absence of countervailing circumstances, the stipulation for cash against bill of lading would have been conclusive. In like manner many of the circumstances existing in this case have been held, in the absence of countervailing circumstances, to be conclusive evidence of an intention to pass the property. There is also another strong fact against the plaintiffs' contention, viz. that the bill of lading was indorsed to the order of the defendant; but that again is only evidence of the intention, and may be rebutted by contrary evidence. The rule as deducible from all the cases, and as it is laid down in the learned works of Mr. Justice Blackburn and Mr. Benjamin on Sale, is, that the question whether the property has passed

being one of intention to be collected from all the circumstances, no single circumstance is necessarily conclusive in all cases, but the conclusion to be drawn must depend on a balance of the various circumstances on one side and the other. The question is therefore one of fact for a jury, and we have here—being placed in the position of a jury—to determine it as a question of fact. I am of opinion that, taken altogether, the evidence in this case shews that it was intended by the parties that the property should pass at Dunkirk. There was another point raised as to the form of the action to which it is necessary to advert. It was contended that the plaintiffs could not maintain trover because there was at least a lien on the part of the vendor. This question appears to me to depend on the question whether there was an absolute refusal by the plaintiffs to accept the bill of exchange in compliance with the terms of the contract. If there was, our decision on this point must be for the defendant. The facts, however, do not appear to me to shew that there was such a refusal on the part of the plaintiffs to accept the bill. When the potatoes arrived, it was supposed by both parties that there were sixteen sacks short. The plaintiffs said that they could not accept the bill for the price of the full number when there were sixteen short; that they were quite ready immediately to pay the amount less the deficiency, or if the defendant liked to wait till the vessel was unloaded, they would accept for what was actually on board. The defendant would be satisfied with nothing else than the immediate and absolute acceptance of the bill for the full amount. The plaintiffs never refused to comply with the contract; and when it turned out that the parties were mistaken, and the full quantity was on board, they were perfectly willing to have taken the whole. Under these circumstances it appears to me that the right of lien did not exist, and the right of possession as well as of property had passed to the plaintiffs. This rule must therefore be discharged.

GROVE, J. I am of the same opinion. Mr. Willis appeared at first disposed to contend that the term "cash against bill of lading" was absolutely conclusive evidence of the intention not to pass the property; but finding that he could not sustain this view, he argued that it was primâ facie conclusive, and that there was no circumstance in the present case sufficient to rebut it. Standing

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by itself it might be conclusive, but there are additional facts in this case. There is first the fact that the bill of lading was indorsed to the consignor's agent, which is strongly in the defendant's favour. But then there are the other circumstances which appear to me of still greater weight in the plaintiffs' favour, viz. that the delivery was to be free on board, that there was a part payment, and that the sacks in which the potatoes were shipped were the plaintiffs'. All these are extremely strong facts pointing to the conclusion that the property passed, and one of these was considered so very strong in the case of *Browne* v. *Hare* (1) as to make that almost a decision in point to the present case. It is true that the cases run very fine, but they none of them, I think, depart from the proposition that the question is one of intention for the jury, when there are circumstances pointing both ways. The case of *Browne* v. *Hare* (1) is very plainly to that effect. In that case the oil, which was the subject of the contract, was to be shipped "free on board," and was to be paid for by bill of exchange on delivery to the defendants of the bill of lading. It was so shipped free on board, and the bill of lading taken deliverable to shippers' order. So far the case was very similar to the present, but the bill of lading was there indorsed to the purchasers, whereas here it was indorsed to the vendor's agent. It was held that the property passed to the purchasers when the goods were placed "free on board" in performance of the contract, and that it was a question for the jury whether the plaintiffs so shipped the oil in performance of their contract to place it free on board, or for the purpose of retaining a control over it and continuing to be owners contrary to the contract. The expression "free on board" appears to have been the main point relied upon in that case. Here, not only were the potatoes to be delivered "free on board," but there was part payment and delivery into plaintiffs' sacks, which alone would be the strongest evidence, according to one class of decisions, that the property passed. The terms "cash against bill of lading" may very well be satisfied by construing them as meant to preserve the vendor's lien, and so as not at all inconsistent with the other facts pointing to an intention that the property should pass.

DENMAN, J. I am of the same opinion. It was desirable that

(1) 3 H. & N. 484; 4 H. & N. 822; 27 L. J. (Ex.) 372; 29 L. J. (Ex.) 6.

we should be referred to the cases on this subject, but in the result I have no doubt the true principle is, that the question whether the property has passed is one of fact for the jury on consideration of the facts on both sides of the question. The rule on the subject is put very clearly in the case of *Van Casteel* v. *Booker*. (1) We have here to act as jurymen, and it appears to me that the facts very strongly preponderate in favour of the conclusion that the intention was that the property should pass, and that the terms which were relied on as pointing to a contrary conclusion should be construed as merely intended to preserve the vendor's lien. With regard to the question whether trover will lie, I agree entirely with the view taken by my Lord.

KEATING, J. I also agree in the conclusion that the intention was that the property should pass, the lien for the balance of the purchase-money after payment of the 30*l.* being reserved to the vendor. With regard to the question whether the action of trover was maintainable, it is the law that if one party absolutely refuses to perform the contract, the other party may rescind. If the defendant was entitled to rescind, he was entitled to sell the potatoes, and his so doing was no conversion; but if he was not so entitled, there was a conversion. The question, therefore, is whether there was an absolute refusal on the part of the plaintiffs to perform the contract. It appears to me that there was no such refusal. It being supposed that some of the sacks were missing, they said, If they are found, we will at once accept the bill for the full amount. If they cannot be found, we are not bound to accept in respect of cargo that is not delivered. The defendant, the market having in the meantime risen considerably, proceeded immediately to sell the potatoes. I think that a reasonable time had not elapsed, and that there was no evidence of such a refusal to perform the contract as would justify the defendant in rescinding the contract and selling the potatoes. There was, consequently, a conversion of the potatoes, and the action is maintainable.

Rule discharged.

Attorneys for plaintiffs: *Dalton & Jessett.*

Attorneys for defendant: *Heather & Co.*

(1) 2 Exch. 691; 18 L. J. (Ex.) 3.

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Jan. 28.

DAWES *v.* HARNESS.

Pleading—Plea of Fraud—Disaffirmance of Contract.

To a declaration on a cheque the defendant pleaded that he was induced to sign the cheque by the fraud of the plaintiff:—

Held, that the plea imported an allegation that the defendant, on discovering the fraud, disaffirmed the contract, and that the defendant was not entitled to a verdict on a traverse of the plea, it appearing that he had not disaffirmed the contract.

DECLARATION on a cheque by payee against drawer.

Plea: That the defendant was induced to sign the said cheque by the fraud of the plaintiff.

Issue.

At the trial the facts were as follows:—

The cheque was given in payment of the purchase-money of the goodwill of a business, fixtures, &c., sold by the plaintiff to the defendant. The defendant alleged that he had been induced to enter into the contract by a fraudulent representation made by the plaintiff. The jury found that the fraud had been committed, but they also found that the defendant had after discovering the fraud remained in possession of the business and fixtures. It was contended for the defendant that the plaintiff ought to have replied specially, if he relied on the fact that the defendant had not disaffirmed the contract, and could not rely on that fact under the general traverse of the plea. The verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

A rule nisi having been obtained accordingly,

Joyce, Q.C., and *F. Turner* shewed cause. They contended that it was necessary for the defendant under the plea of fraud to prove that he had repudiated the contract. [They cited *Campbell* v. *Fleming* (1); *Bwlch-y-Plwm Lead Mining Company* v. *Baynes* (2); *Lawton* v. *Elmore* (3); *Deposit Life Assurance Company* v. *Ayscough* (4); *Selway* v. *Fogg* (5); *Sanderson* v. *Collman*. (6)]

(1) 1 A. & E. 40.
(2) Law Rep. 2 Ex. 324.
(3) 27 L. J. (Ex.) 141.
(4) 6 E. & B. 761; 26 L. J. (Q.B.) 29.
(5) 5 M. & W. 83.
(6) 4 M. & G. 209.

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Willis, and *J. D. Fitzgerald*, supported the rule. They contended that, the fraud being proved, the cheque was primâ facie avoided, and that the fact that the defendant had set up the contract again by electing to retain the benefit of it ought to have come from the plaintiff by way of replication, relying upon the analogy of the replication of ratification to a plea of infancy, of disability to a plea of the Statute of Limitations, or of felony to a plea under the Carriers Act.

BRETT, J. I am of opinion that this rule must be discharged. The declaration was upon a cheque drawn by the defendant, and to establish the defence it was necessary to shew that the cheque was obtained by a fraudulent representation, and that the defendant, on discovering the fraud, disaffirmed the contract. If it were true to say that the fraud per se avoided the contract, the argument for the defendant would be good. But the true legal doctrine is that fraud merely renders the contract voidable, that is to say, gives an option to the party defrauded to disaffirm the contract, but until he disaffirms it remains good. The plea of fraud taken as an allegation that the contract was procured by fraud and nothing more would not amount to a defence, for it would be consistent with it that the contract still remained in existence. The forms of pleading allow fraud to be pleaded generally, but the plea must be taken to include an allegation that the defendant disaffirmed the contract, otherwise it would be a bad plea. This implied allegation is traversed by the traverse of the plea, and if the evidence shew that the contract was induced by fraud, but the defendant has not disaffirmed the contract, the plea will not be proved. The jury here found that part of the plea only was proved, and that though the contract was procured by fraud, the defendant had not disaffirmed it. If authority were wanting for our decision the opinion of Pollock, C.B., in *Lawton* v. *Elmore* (1), is sufficient authority.

GROVE, J. I am of the same opinion. If the mere words of the pleadings were looked at, it would seem as if the traverse of the plea only raised the question whether the contract was obtained

(1) 27 L. J. (Ex) 141.

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by fraud. But the plea of fraud must be looked upon as a short form adopted for the sake of brevity, importing not an allegation of fraud only, but also of all circumstances necessary to render fraud a defence. Now, fraud only makes a contract voidable at election, and to make the plea good we must assume that it alleges that the defendant elected to determine the contract. If so, a replication such as was suggested is not necessary. There is no instance to be found of such a replication, and yet this question must have constantly occurred. The opinion expressed by Pollock, C.B., in the case of *Lawton* v. *Elmore* (1) is a strong authority for the view we take.

Rule discharged.

Attorney for plaintiff: *Stokes.*
Attorneys for defendant: *Lumley & Lumley.*

Jan. 26.

IN RE BOSTON ELECTION PETITION.

MALCOLM, PETITIONER; PARRY AND INGRAM, RESPONDENTS.

Parliament—Election Petition—Corrupt Practices—Joint Candidature—Agency.

Where a candidate for election to parliament had been guilty of bribery through his agent, by reason of acts committed by such agent to procure votes for him at the election, and subsequently to such acts of bribery another candidate coalesced with him, in ignorance of any previous corruption, and having no reason to suspect its existence:—

Held, that such last-mentioned candidate was not liable by reason of the joint candidature to be unseated in respect of such acts of bribery.

CASE stated by Grove, J., under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 11.

This was a petition against the return of the respondents as members of parliament for the borough of Boston.

The facts, so far as at present material, were as follows. The respondents were declared duly elected at the election for the borough on the 3rd of February, 1874.

The respondent Ingram, in the year 1872, consented, in response to a requisition numerously signed by Liberal electors of the

(1) 27 L. J. (Ex.) 141.

borough, to offer himself as a candidate for the borough whenever a vacancy should occur. On the 16th of December, 1873, a public meeting of Liberal electors was held in the borough for the purpose of establishing a Liberal association or club, the object of such association being, as stated, to keep together the Liberal party at Boston. At this meeting, the respondent Parry attended. Ingram was not present at such meeting, having on that day left England for Algeria, but he had previously been informed of the intention of the promoters to form such an association, and knew and approved generally of the purposes for which it was formed. He did not attend any meeting of the association nor was he a member of it until after his election.

About the end of December, 1873, and after Ingram had left England, Parry determined, mero motu, to give away about 230*l.* in coal among the poor of Boston. A distribution of coals accordingly took place, which was effected by Parry's agent, one Dyer. Parry's name alone appeared in the transaction as that of the donor of the coal, the distribution being by tickets or orders purporting to be given by Parry, and having on the back the words "with Mr. Parry's compliments." The coals were distributed by Dyer to electors corruptly, in order to influence votes in favour of Parry. The judge held, that Parry through his agents, though not personally, had been guilty of corrupt practices and that he was not duly elected. (1)

Ingram, in December, 1873, was willing to allow his name to be associated with any other respectable candidate whom the Liberals might bring forward, but if one vacancy only had occurred in the meantime he would have stood alone.

The judge found that Ingram did assent to have his name associated with that of Parry for nomination at an ensuing election, but at the time of such assent he did not expect any immediate dissolution of parliament.

When Ingram left England in December, 1873, a dissolution was not anticipated, and he did not leave any instructions or autho-

(1) The particulars of the corrupt practices which were commited by Parry's agent Dyer, and which led to Parry being unseated, are fully set forth in the report of the case of *Malcolm* v. *Parry* (Law Rep. 9 C. P. 610), and it has been thought unnecessary to give them again at length.

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MALCOLM v. PARRY. (2ND CASE.)

rity with any person to act on his behalf in the event of a dissolution, or as to anything connected with a dissolution or his candidature, nor had any arrangement, understanding, or agreement been come to by him or by any person on his behalf as to the conduct of an election whenever it should occur. He had no idea that a dissolution would occur before the then parliament had run to its end, viz. the autumn of 1875. Mr. G. W. Thomas had been in the habit of communicating with him as a friend in reference to political among other subjects, and had paid Ingram's subscriptions to different charities at Boston.

Ingram was not personally, nor by any person authorized by him, directly or indirectly, a party to, or in any manner concerned in the determination to distribute, or distribution of or payment for the coals, or in any other corrupt practice. From the time he left England on the 16th of December, 1873, until after the distribution of the tickets for the coals, Ingram was abroad, and had no communication whatever with Parry or with any other person on his behalf, or in reference to any matter connected with his or Mr. Parry's candidature; nor until after he arrived at Boston, on his return on the 29th of January, did he know anything about the distribution of coals, nor did he then sanction it.

On the 27th of November, 1873, a number of townsmen having signed a memorial requesting Ingram and Parry to contest the borough at the next parliamentary election, letters were sent to Ingram and Parry respectively, informing them of the fact, and requesting them to reply in time for their letters to be read at a meeting of the memorialists to be held shortly. Ingram answered, stating that he would arrange to meet his supporters, as he could better say than write what he thought it would be right for him to do under the circumstances. By a subsequent letter he stated that he should be unable to attend the meeting, because he was going to Algeria; but requested that the meeting might be assured of his hearty sympathy for the project of consolidating the Liberal party of Boston and his readiness to do all in his power to help them in all their undertakings for the advancement of Liberalism in the borough. The dissolution of parliament took place very unexpectedly on the 24th of January, 1874, and thereupon the distribution of coal-tickets was immediately discontinued,

and on the same day, Thomas telegraphed to Ingram, who was then at Nice, to come back.

There was a committee of the Liberal Association for promoting the election of Parry and Ingram, but Ingram did not know who they were or what they were doing until the election was over.

After the dissolution, and before Ingram's return, a joint circular was issued by Messrs. Dyer and Thomas to the electors, requesting them to reserve their votes for Thomas Parry, Esq., and W. J. Ingram, Esq. There was no evidence that Ingram knew of this circular. For several years prior to Ingram's arrival at Boston, which took place on the 29th of January, 1874, he had not had any communication personally or otherwise with Parry; and on the 26th of January Parry issued an address to the electors, announcing himself as a candidate, but making no allusion of any sort or kind to Ingram, or to any joint candidature, and soliciting votes for himself only. Ingram was not aware of the dissolution until he received Thomas's telegram. On receipt of it he started for Boston, and on his arrival there immediately issued an address. In this address he made no allusion to Parry or any joint candidate, and solicited votes for himself only. When he arrived at Boston, finding that cards and placards had been issued with the names Parry and Ingram, he caused the order of the names to be altered to Ingram and Parry on cards subsequently issued.

From the day after Ingram's arrival, Thomas acted as his duly authorized agent for all the purposes of the election, and the committee before referred to acted as the joint committee of Ingram and Parry for the purpose of promoting their election, and with the exception of their personal expenses, Ingram and Parry divided all their expenses of and incidental to the election subsequent to Ingram's return.

It was not until after Ingram's return to Boston that he first heard of there having been a distribution of coals, but, as he then understood, to the poor only. He heard also that there was a rumour in the town that he was also going to give away coals after the election, for which he stated there was no foundation. On the 30th of January Ingram duly appointed Thomas his agent for election expenses, and it was found in the case that neither Dyer nor Thomas were authorized to act as agents for

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Ingram for election purposes prior to that date, unless Ingram, by permitting his name to be associated with Parry, unintentionally conferred such authority.

It was also found that Ingram was not personally guilty of any bribery or corrupt practices at the election, and that up to the time of the election he was ignorant of any having been committed.

The question submitted for the Court was whether Ingram became in law affected by or responsible for the acts of Parry or Parry's agents by such consent to allow his name to be associated with Parry's for nomination as Liberal candidate, so as to make him guilty of corrupt practices by an agent or agents.

Thesiger, Q.C. (with him *Cave*), for the petitioner. The question is whether, where there is a joint candidature, and one of the candidates has been by his agent guilty of corrupt practices before the joint candidature began, the other candidate is not also affected by such practices. Assuming that there was no joint candidature until the 30th of January, and putting aside all question of any assent on Ingram's part to be associated with Parry before that date, it is contended that Ingram must bear the consequences of the bribery committed by the agent of Parry.

The doctrine of agency in election matters is not based on similar considerations to those which govern the common-law doctrine of agency. Election law does not look in the matter to the guilt or innocence of the candidate, but to the question whether there has been a pure election. According to the doctrine laid down by Blackburn, J., in the *North Norfolk Case* (1), and approved of by Keating, J., in the second *Norwich Case* (2), Ingram must be considered to have made Dyer his agent for the purposes of the election, and is responsible for what he did before as well as after the coalition. If it were not so, the most absurd consequences would follow. The whole object of the rule as to joint candidature would be lost. Suppose that a candidate went down to a constituency alone, and bribed sufficiently to secure a majority of the votes of the constituency for his party. Another candidate comes down later, who has been kept in ignorance of

(1) 1 O'Malley & Hard. 240. (2) 2 O'Malley & Hard. 39.

what was going on, and agrees to join with the first in his candidature. Is he to retain the seat that has clearly been obtained by corruption because he is innocent of the corruption? That would be contrary to the principle of election law, which is to secure the choice of a member by the constituency unbiassed by corrupt motives.

[LORD COLERIDGE, C.J. But how far is this principle to be carried back? On your shewing a candidate could hardly ever be safe in joining with another candidate.]

The proper limit would be that it should only apply to matters which might fairly be supposed to be connected with the election in question.

It must be admitted that the gift of coals was only expressly made in the name of Parry, but it was obviously likely to operate in favour of the candidate associated with him. In the nature of things, it is not usual that corrupt gifts are made with any very distinct expression of the object for which they are made; the probable effect of them must be looked to. If the agent of one of two joint candidates bribes or does any other act distinctly in the interest of one candidate alone, and against that of the other, the agency will be determined so far as the latter is concerned. There is nothing of the sort here. [He cited the first *Norwich Case.* (1)]

Hawkins, Q.C. (with him *J. O. Griffits*), for the respondent Ingram, were not called upon.

LORD COLERIDGE, C.J. The material facts of the case are as follows. In the year 1872, Mr. Ingram agreed to become a candidate at the next election for Boston, but at the time when he so agreed no election was in prospect, nor had any candidate been declared. In December, 1873, though no election was then contemplated as near at hand, Mr. Parry had declared himself a candidate, and it is found that Mr. Ingram in December, 1873, was willing to allow his name to be associated with any other respectable candidate whom the Liberals might bring forward; but if one vacancy only had occurred in the meantime, he would have stood alone. It is also found that he did assent to have his name associated with that of Mr. Parry for nomination at an

(1) 1 O'Malley & Hard. 10.

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ensuing election, but at the time of such assent he did not expect any immediate dissolution of parliament. Immediately afterwards he left England, and went to Algeria, and was not personally connected in any way with the transactions that avoided Mr. Parry's election. After Mr. Ingram left England, Dyer, who had been appointed Mr. Parry's agent, was guilty of the acts which, by the judgment of this Court, invalidated the election of Mr. Parry. At that time all Mr. Ingram had done was to consent to be associated with Mr. Parry for nomination at any ensuing election. He knew nothing of Dyer as Mr. Parry's agent, or of the acts of bribery committed by him, and the facts shew that such acts were committed on behalf of and in the interests of Mr. Parry alone. The dissolution takes place, and Mr. Ingram then returns and associates himself with Mr. Parry as a joint candidate. From that time he was no doubt responsible for what Mr. Parry's agents might do, however innocent he might be, inasmuch as they were then engaged in a joint candidature. Mr. Thesiger was correct in saying, that what the law looks at is not the guilt or innocence of the candidate, but the purity of election. The candidate is liable for the act of the agent if done on his behalf and in his interest, though personally altogether unaware and innocent of it. But in this case it is sought to carry the principle a great deal further, and to say not only that the innocent candidate is liable for the acts of the agent of the other candidate with whom he is associated after he has constituted him his agent, which by a very reasonable rule he is considered to have done by entering on the joint candidateship; but further, that he is to be responsible for acts of corruption, of which he was wholly unaware, committed in the interest of the candidate with whom he has coalesced, it may be years before, and at a time when he had no knowledge of or control over the person committing such acts, and could not be considered as either directly or indirectly connected with them. I cannot think that the doctrine of agency in relation to election matters, though I admit that it is very different from the rules of the common law with regard to agency, and reasonably so, can be stretched to this extreme length. The strongest cases of constructive notice and trespass by relation would come far short of such a doctrine. It seems to me that the authorities that have been cited

are quite consistent with the view I take. In the case before my Brother Blackburn it is clear that the coalition took place before the acts complained of, with which it was sought to fix the innocent candidate. Again, in the case before my Brother Keating it is clear that he did not intend to decide, and did not decide anything inconsistent with the decision in the *North Norfolk Case.* (1) There, too, the combination had taken place before the act complained of, and it was sought to avoid the effect of it by showing a determination of the agency. The point decided by Keating, J., was that there was no such determination. A case was put to us in the course of the argument as a reductio ad absurdum, but I cannot say it appeared to me convincing. Put the case thus: suppose a person wholly unconnected with either candidate, but with strong political feelings, chooses, unknown to either party, long before the election, to bribe so extensively as to make the election safe, and that he is appointed by one of the candidates, in perfect innocence, his agent, and during the course of the election his conduct is perfectly pure: so that when he was bribing he was not agent, and when he was an agent he was not bribing. I confess it seems to me that it would be very unreasonable that a candidate should be responsible in such a case. How could he ever be safe, if he were to be held responsible for acts of which he was wholly ignorant, committed at a period during which the relation of principal and agent did not in any sense exist between himself and the person committing such acts? It appears to me that both on grounds of reason, and on the authorities, so far as they go, the argument for the petitioner fails, and that there must be judgment for the respondent.

KEATING, J. I am of the same opinion. The acts which invalidated Mr. Parry's election were committed by his agent at the end of December, 1873, and whilst Mr. Ingram was away from England. The question is, whether Mr. Ingram is responsible for them. It is sought to make him so by introducing into this case the doctrine established by the cases cited as to the effect of a coalition. Now I take it that the doctrine is, that when two candidates

(1) 1 O'Malley & Hard. 240.

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coalesce they embark, as it were, in the same boat, and become jointly responsible for what they or their agents may do in the course of the election. But here it is sought to make one responsible for the acts of the other's agent, committed, so to speak, before they got into the boat together; before the election commenced, and before, in any proper sense of the term, there were any candidates at all. I do not think that merely announcing an intention to become a candidate at a future election constitutes a person a candidate within the meaning of the doctrine of joint candidateship. The present case is altogether wide, in my opinion, of the cases referred to. There was no coalition here at all until a period sufficiently long after the acts which led to Mr. Parry's losing his seat to prevent them being reasonably considered as acts done in relation to the joint candidateship. If it could have been shewn that one candidate had combined with the other, knowing what had been done, so that he might be considered as having adopted it, another question would arise which it is wholly unnecessary to decide now, since nothing of the sort is alleged here. On the whole I can see no such association of the candidates at the time when the bribery was committed as would render Mr. Ingram responsible for the acts done by the agent of Mr. Parry.

GROVE, J. I am of the same opinion. It appeared to me at the trial that the point was of sufficient importance to be reserved for the opinion of the Court, inasmuch as it might frequently happen, in cases of coalition between two candidates, that the question would be raised, how far one candidate was responsible for the acts of the agent of the other. I must own that after hearing the argument, I think I ought to have decided the question myself. In cases of this nature it seems to me, on consideration, that the decision of each case must turn very much on its individual circumstances, and that one case can seldom be a conclusive authority, or do more than afford an argument in respect to other subsequent cases. An apparently small alteration of the circumstances may make an important difference in principle. The facts are shortly these: It was proved that Mr. Ingram was

willing, at a time when there was no expectation of a dissolution, to be associated with any respectable candidate in the Liberal interest, and he ultimately agreed to coalesce with Mr. Parry. The question is, whether he was thereby made responsible for the acts of Dyer, Mr. Parry's agent. Mr. Thomas, who subsequently became Mr. Ingram's agent, was not, at the time of the acts complained of, his agent, though he was in correspondence with Mr. Ingram, and no doubt it was intended that he should become his agent whenever he required one. It is suggested that Mr. Ingram was responsible for Dyer's acts, because he might in some indirect way have got the benefit of them. Up to the time of the dissolution Mr. Ingram was quite innocent of any participation in any acts of bribery, and had no agent of his own. The coals were not distributed in the name of Messrs. Ingram and Parry, but in the name of Mr. Parry alone. Though it is conceivable that Mr. Ingram might have been benefitted in some way by the popularity accruing to Mr. Parry through the distribution of coals, it is just as probable that he might have been injured, since voters corruptly disposed might have contrasted Mr. Parry's liberality with the fact that Mr. Ingram had given no coals, unfavourably to the latter. It is clear, therefore, that the facts fail to shew that Mr. Ingram's election was in any way influenced by the bribery committed by Dyer. One reason why it does not seem to me that this can afford a conclusive precedent in future is, that such a variety may exist in respect of the circumstances under which one candidate allows himself to be associated with another. If he were to do so under circumstances affording a reason on his part for surmising that acts of impropriety had been committed by the agent of the other candidate, or if he were wilfully to shut his eyes to what was going on, and allow the agent of the other party to prepare the way for the election, and then consented to be a joint candidate with him, reckless of what had taken place, it is very possible that the result of the case might be different. No such circumstances are suggested as against the present respondent. The very fact of the existence of this case might possibly be an element to be considered in future cases of coalition. Where parties have received a warning of the possibility that a certain

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state of things may exist, the case may be different from what it would be when they had no ground for suspecting it. It is often alleged that election decisions are conflicting; but it seems to me that, in many cases, the apparent conflict results from the fact that a certain state of things may acquire a different complexion, when it has frequently occurred and been made the subject of investigation, from that which it bore before the possibility of its existence became notorious. Parties are bound to exercise greater caution in respect of such a state of things than they were before. With respect to the present case, I agree with the decision of my Lord. I do not think that Mr. Ingram, under the circumstances, by subsequently coalescing with Mr. Parry, ratified the corrupt acts of the agent of the latter.

DENMAN, J. I am of the same opinion. If we were to hold that Mr. Ingram must be unseated on account of the illegal acts of Dyer, on the ground that they were committed by him as agent for Mr. Ingram, it appears to me that our decision would be contrary to reason and justice. Mr. Thesiger cited two cases as authorities to establish his proposition, but it seems to me, that we should be carrying the doctrine of those cases to an unreasonable extent, if we held that they applied to the circumstances which existed in the present case.

Judgment for the respondent.

Attorneys for petitioner: *Collyer, Bristowe, & Co.*
Attorneys for respondent Ingram: *Rogerson, & Ford.*

[IN THE EXCHEQUER CHAMBER.]

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Feb. 7.

LISHMAN AND ANOTHER *v.* THE NORTHERN MARITIME INSURANCE COMPANY.

Insurance on Freight—Warranty as to Amount of Insurance on Hull—Concealment—Non-communication of a material Fact coming to the Knowledge of the Assured after Acceptance of Risk but before issuing the Policy.

A proposal for insurance on freight was made and accepted on the 11th of March. On the 16th, the ship was lost. On the 17th, the assured, with knowledge of the loss, but without communicating it to the insurers, demanded a stamped policy. The insurers then, for the first time, required to be informed as to the amount of the insurance upon the hull, and inserted in the policy (which the assured accepted), the following warranty, "Hull warranted not insured for more than 2700*l.* after the 20th March." The vessel was then insured for an additional 500*l.* in an insurance club, by the rules of which all ships belonging to members were insured from the 20th of March in one year to the 20th of March in the following year, "and so on from year to year unless ten days' notice to the contrary be given;" and in the absence of notice the managers of the club were to renew each policy on its expiration:—

Held, affirming the decision of the Court below, that, notwithstanding those rules, the club policy was not a continuing policy beyond the 20th of March of the current year; and that the ship having been lost before that date, no new effective policy could have been made, and, consequently, the warranty was complied with.

Held, also, that the risk having been accepted by the insurers on the 11th of March, the addition on the 17th of a term for their benefit, and not affecting the risk, did not prevent the policy from being one drawn up in respect of the risk accepted on the 11th, and, therefore, upon the authority of *Cory* v. *Patton* (Law Rep. 7 Q. B. 304), the concealment of the loss was not a concealment of a material fact so as to avoid the policy.

APPEAL from the decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendants.

The facts of the case are fully set out in the report below. (1)

Herschell, Q.C. (with him *C. Crompton*), for the defendants. This case is distinguishable from *Cory* v. *Patton*. (2) Admitting that the law is, that where there has been a previous agreement for an insurance, followed by a policy pursuing the terms of such agreement, the obligation to disclose material facts only extends to the time of such previous agreement, here the terms of the policy did

(1) Law Rep. 8 C. P. 216. (2) Law Rep. 7 Q. B. 304.

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not correspond with those of the previous agreement. There never was a previous agreement for the insurance ultimately effected by the policy. The principle is that where there is a complete agreement binding in honour, and all that remains to be done is to issue a stamped policy embodying such agreement, the policy is to be considered as if executed at the date of the previous agreement. That principle cannot be applied here. The plea that at the time of making the policy there was a concealment of a material fact is proved. It is admitted that if the alteration made the contract more burdensome to the underwriter, and the concealment was of a fact material to the question whether the alteration should take place, there would be a concealment vitiating the policy. There is no authority for the proposition that you can split up the altered contract into different parts, and make the duty to disclose end at different periods with regard to different stipulations forming part of it.

It is contended, secondly, that the warranty was not complied with. Insurance for the purposes of the warranty includes a case where there was an agreement to insure as well as where there was a complete insurance.

Sir John Holker, S.G. (with him *G. Bruce*), for the plaintiffs, was not called upon.

BRAMWELL, B. I am of opinion that the judgment below should be affirmed. With regard to the question as to the warranty, it appears to me clear that there was no insurance contrary to the terms of it after the 20th of March. Putting aside the difficulty under the Stamp Act, and assuming that the defendant could rely on a contract not enforceable at law, there was at the utmost only a right to an insurance optional on the part of the plaintiff, and, it would appear, to some extent on the part of the managers of the club. The vessel was lost on the 17th of March, and it is impossible to suppose there could be any insurance then to commence at a future date, that is to say, after the 20th of March. With regard to the remaining question, it is admitted on the authorities that, where there is a complete agreement for an insurance contained in what is known as a slip, but which would not itself be available for want of a stamp, and afterwards a

policy is executed in conformity with it, if everything material is communicated up to the time of the giving the slip, but something material arising between that time and the time of executing the policy is not communicated, there is no concealment so as to vitiate the policy. What the defendant here seeks to say, put plainly, is this: If the underwriter, when called upon to execute the policy in pursuance of the contract, asks for some additional term to which he is not entitled, and the assured consents because he thinks the matter indifferent, or it is one which he may be disposed to concede in favour of the underwriter, then, by some strange process, in consequence of his so consenting, the underwriter is entitled to have a communication made to him to which otherwise he would not have a right. This contention is plainly opposed to good sense.

The principle to be derived from the authorities is, that the time between the slip and the policy is not to be counted, and the latter relates back to the former. The defendants' contention is that here the insurance must be considered as made, not at the time when the agreement for it was first come to, but at the time when the arrangement for the additional term was made. It seems to me that this is not so, and that the principle established by the authorities applies to this case. The insurance must relate back to the time of the real agreement: although modified, it is in truth only the result of such agreement. The case would be different if the parties, after making the original agreement, were dissatisfied with the terms of it, and altered it in drawing up the final terms of the insurance, so as substantially to alter the nature of the bargain as affecting both sides. In that case it might well be that the obligation to communicate material facts would continue until the time of the execution of the policy, at any rate with respect to all matters material to the alteration of the terms. There is no such a state of things here. The stipulation introduced was merely one for the benefit of the underwriter, to which he was not entitled, and the concealment was not material with regard to it. If we are to look at the substance of the thing, the principle of *Cory* v. *Patton* (1) and *Ionides* v. *Pacific Insurance Co.* (2) is clearly applicable to this case. The rule as thus laid

(1) Law Rep. 7 Q. B. 304. (2) Law Rep. 6 Q. B. 674; Law Rep. 7 Q. B. 517.

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down is this: The obligation that the law attaches to the relation of insurer and insured, viz. that up to the time of the insurance material facts must be communicated, must be taken with this qualification, that when there is a previous agreement out of which the policy of insurance substantially arises, by mercantile usage the obligation attaches up to the time of making such agreement only, and not up to the time of making the policy.

BLACKBURN, J. I am of the same opinion. The first question is, whether there was a breach of the warranty. It is not necessary to decide what the effect would have been if a new policy had been issued by the club. No such policy ever was issued; and the ship being lost, and known to be lost, no such policy ever could be issued. It is clear the warranty was complied with. The second question is as to the concealment. The rule has been long established that a concealment of material facts known to the assured before effecting the insurance will avoid the policy, the principle being that with regard to insurance the utmost good faith must be observed. Suppose the policy were actually executed, and the parties agreed to add a memorandum afterwards, altering the terms: if the alteration were such as to make the contract more burdensome to the underwriters, and a fact known at that time to the assured were concealed which was material to the alteration, I should say the policy would be vitiated. But if the fact were quite immaterial to the alteration, and only material to the underwriter as being a fact which shewed that he had made a bad bargain originally, and such as might tempt him, if it were possible, to get out of it, I should say there would be no obligation to disclose it. In the case of a stamped policy actually executed, the underwriter would have no temptation to get out of the bargain, because in that case he would have no opportunity. But the stamp laws put it in his power, in the case of a slip, to get out of the engagement which in honour he ought to fulfil. It was decided in *Cory* v. *Patton* (1) that the obligation to disclose material facts does not in such a case extend to making it necessary to disclose facts after the underwriter is once bound in honour, and so to tempt him to

(1) Law Rep. 7 Q. B. 304.

break his engagement. That decision has been since adhered to in other cases. Now this case is, according to the principle of *Cory* v. *Patton* (1), exactly the same as if, on the 11th of March, a stamped policy had been executed, and then a memorandum containing the alteration afterwards added. It seems to me, therefore, that my Brother Brett was right when he left it to the jury to say, whether the fact that the ship was lost was material, in relation to the proposed alteration of the policy from the terms of the previous agreement. If the premium had been reduced in consideration of the warranty, then the loss of the ship might have become a material fact to be known by the underwriter before consenting to such an alteration. Here the fact was quite immaterial to the alteration, and the jury so found.

MELLOR, J. The only question is, whether this case can be distinguished from *Cory* v. *Patton.* (1) Mr. Herschell endeavoured very ingeniously to distinguish it, but in my opinion there is no substantial distinction.

CLEASBY, B. I am of the same opinion. Any difficulty that there might otherwise be in the case appears to me to be entirely removed by the finding of the jury, that the fact of the ship's loss was not material to be communicated to the underwriter on the 17th of March. Unless we could see that there was no reasonable evidence to support that verdict, we ought not to set it aside. I cannot say that there was not sufficient evidence to support it.

POLLOCK and AMPHLETT, BB., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Mercer & Mercer, for Oliver & Bottrell.*

Attorneys for defendants: *Williamson, Hill, & Co., for R. P. & H. Philipson.*

(1) Law Rep. 7 Q. B. 304.

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Jan. 22.

MORGAN *v.* ALEXANDER.

Oral Examination of Witness before a Master—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), *s.* 46—"*Hearing of any Motion.*"

The 46th section of the Common Law Procedure Act, 1854, enacts that "upon the hearing of any motion or summons," it shall be lawful for the Court or a judge at their or his discretion from time to time to order the production of documents or the oral examination of witnesses, before such Court or judge or before a master:—

Held (by Lord Coleridge, C.J., Keating and Denman, JJ.; Grove, J., doubting), that the terms "hearing of any motion" included the application for a rule nisi, and, consequently, that an order for the examination of witnesses might be made upon a motion for an attachment against a defendant for not answering interrogatories.

Thomas v. Stutterheim (5 W. R. 6) distinguished.

THIS was an action upon a policy of marine insurance.

The policy was effected through a firm of brokers professing to act for the defendant, and purported to be underwritten by "Charles Alexander per J. Rigg." Interrogatories were administered to the defendant through the attorneys who appeared for him, and further time was obtained for answering, but they had never been answered. Inquiries had been made for the defendant by the plaintiff, but no person of that name could be found notwithstanding most diligent search. It was discovered, however, that the Christian names of one of the brokers professing to act for Charles Alexander were Charles Alexander. And on inquiries being made of his partner as to the defendant's address by the plaintiff, no satisfactory answer could be obtained.

C. S. C. Bowen moved for a rule nisi for an attachment against the defendant, and also applied for an order absolute to examine the broker and his partner before the master, under the 46th section of the Common Law Procedure Act, 1854. He cited *Thomas* v. *Stutterheim* (1); *Ashcroft* v. *Foulkes* (2); and *Coston* v. *Blackburn.* (3)

(1) 5 W. R. 6.

(2) 18 C. B. 261; 25 L. J. (C.P.) 202.

(3) Law Rep. 8 Q. B. 54.

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[GROVE, J., suggested in the course of the argument that the words "hearing of any notice" in the section did not apply to the ex parte application for a rule nisi.]

LORD COLERIDGE, C.J. I think that the plaintiff is entitled to a rule nisi for an attachment, and to an order for the examination of these two persons before the master, in aid of that rule. The case of *Coston* v. *Blackburn* (1) is directly in point to shew that where, under the Common Law Procedure Act an order is made for interrogatories, the contempt is complete upon failure to answer. And this would be more particularly the case where an application has been granted to extend the time for answering. The application for the order to examine the persons in question is made under the 46th section of the Act. The facts of the case are these: There is good reason shewn for believing that there is no person answering to the name of the alleged defendant, and that the person using that name is in truth one of a firm of brokers, two members of which firm are cognizant of the fraud, and able to state what the fact really is as to the existence of the defendant.

I think the terms of the section are abundantly sufficient to cover the present application. The intention seems to have been that whenever, during the progress of any proceeding on motion or at Chambers, justice may be aided by summarily ordering the production of documents or the examination of witnesses, an order may be made for that purpose. It is suggested that the meaning is to be limited to the hearing of the argument against a motion. The words "hearing of a motion" would certainly in their natural sense apply to what we have just now been doing, and in that sense I construe them.

The case of *Thomas* v. *Stutterheim* (2) was cited, which is referred to by Mr. Day in his book on the Common Law Procedure Act, 3rd ed. p. 245. The head-note of that case does not correctly represent the decision. The Court there doubted whether they had power to make an order absolute in the first instance for the exa-

(1) Law Rep. 8 Q. B. 54. (2) 5 W. R. 6.

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mination of a witness on the point of death, the application not being incidental to any motion or summons. Mr. Day seems correctly to give the result of the case when he says, "It would seem that the section is intended only to provide evidence upon otherwise pending motions or summonses." This case is not, therefore, at all inconsistent with the construction we are now putting on the statute, and it appears to me that the construction is in accordance both with the natural meaning of the terms used and the reason of the thing.

KEATING, J. I am of the same opinion. The wording of the 46th section is no doubt open to the doubt suggested. The case is a peculiar one; there is a motion for a rule nisi for an attachment; to make that effective there must if possible be personal service. The applicant brings before us the fact that there has been the fraudulent putting forward of a fictitious name, and that there are certain persons who there is reason to believe are cognizant of the fraud, and can say whether there is such a person as the defendant or not. To assist the plaintiff under these circumstances we are bound in furtherance of justice, if the words of the section enable us, to get at the truth by ordering an examination of these persons. It appears to me that without straining the words of the section they enable us to make the order.

GROVE, J. I agree that if the words of the 46th section authorize our granting this application, we ought to grant it in this case. I feel bound, however, to say that I entertain considerable doubt, on the wording of the section, whether it means that on a mere ex parte application of counsel an order may be made for the examination of persons, provided only that some other motion is made at the same time as such application. The words are, "on the hearing of any motion or summons." It could hardly be contended that this would include the mere granting of a summons. It must in that case mean the hearing of argument upon shewing cause against the application. Can the meaning then be different with regard to a motion? Assuming it to be clear that upon the true construction of the words an application could not

be made alone for an order absolute in the first instance for the examination of witnesses, then can it make any difference that such application is coupled with a motion for an attachment, on the ground that that constitutes the hearing of a motion? It appears to me that this involves a great straining of the words. The case of *Thomas* v. *Stutterheim* (1) is very shortly reported, but as I read the report, it appears to me that the doubt there expressed is the same as that which occurs to me. I find it difficult to call this application a pending motion or summons.

I am not prepared absolutely to dissent from the judgment of the rest of the Court, but I am not convinced that their construction is the correct one.

DENMAN, J. In the course of the motion I entertained some little doubt, but I cannot on a careful consideration of the terms of the section say that I now think the matter doubtful. The 46th section gives power to the Court to make the order for vivâ voce examination on "the hearing of any motion or summons," and (at the conclusion of the section) "upon hearing such evidence, or reading the report of such master, to make such rule or order as may be just." It appears to me that the present application is within the natural meaning of the words "the hearing of a motion." The words "motion or summons" must be read reddendo singula singulis with the words that follow; that is to say, in the case of a motion the Court may make the order, or in that of a summons, the judge. The term "hearing of a motion" is not, as it seems to me, confined either to the motion for a rule nisi or the hearing of the argument upon shewing cause, but will include both. In either case, the Court would be engaged in "hearing a motion," inasmuch as the counsel in support of the rule sometimes actually, and always virtually, moves to make the rule absolute before the counsel on the other side shews cause. I think this view is materially strengthened by the concluding words of the section to which I have referred. Here, for instance, the Court might, upon hearing the report of the master, after the examina-

(1) 5 W. R. 6.

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MORGAN v. ALEXANDER.

tion has taken place, be materially influenced by that report as to the course it would adopt upon the further argument of the rule. It is clear that in this case the Court ought to have before it the materials which this examination may supply when the rule comes on for argument. It oes not appear to me that the case of *Thomas* v. *Stutterheim* (1) is really any authority against the view we are now taking. The true statement of the effect of that case is that given by Mr. Day. All I gather from the decision is that it will not be enough that there should merely be a motion for the very thing that is required under the 46th section, e.g., to examine witnesses in the first instance. There must be some other substantive motion to which the application is incidental. Here there is a motion to attach for contempt, and ample ground for requiring this examination with reference to that motion, in order to see whether there has been a contempt or not, and who is the party guilty of it. For these reasons I am of opinion that the rule nisi should be granted for the attachment, and an order for the examination of these persons in aid of it.

LORD COLERIDGE, C.J. The order will be that the witnesses be examined forthwith.

Rule accordingly.

Attorneys for plaintiffs: *Meredith, Roberts & Mills.*

(1) 5 W. R. 6.

BRADSHAW AND WIFE *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

1875
Jan. 22.

Executors and Administrators — Contract — Action by Executor — Breach of Contract causing Testator's Death—Damage to personal Estate.

Where a passenger on a railway was injured by an accident, and after an interval died in consequence:—

Held, that his executrix might recover in an action for breach of contract against the railway company the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business.

16 Q.B.D. 599
603, 45
4 C.P.D. 43
45
9 Q.B.D. 111
112
21 L.J. 488

DECLARATION in substance stated that the testator, of whom the female plaintiff was executrix, in his lifetime carried on business as a boot and shoe manufacturer, and that, in consideration that the testator would become a passenger to be carried by the defendants upon their railway on a certain journey for reward to the defendants in that behalf, the defendants promised the said testator to take due care in carrying him whilst he was such passenger. Averments, that he became such passenger and of performance of conditions precedent. Breach, that the defendants did not take due care in carrying the testator whilst such passenger on such journey, whereby he was injured, and incurred expense in medical attendance and otherwise in relation to his injuries, and was prevented from attending to his business, and from personally conducting the same and from realising profits therein, and great loss and damage was occasioned to the personal estate of the testator.

Pleas: 1, denial of the promise; 2 and 3, denying the averment that the testator carried on business as alleged and the allegation of damage to the personal estate of the testator; 4, denial of breaches; 5, demurrer.

Issues and joinder in demurrer.

At the trial, before Denman, J., at the last Manchester spring assizes, the facts were as follows:—The female plaintiff was the executrix of the testator, and he, while travelling on the defendants' railway, had been injured by a railway accident. He ultimately died from the injuries received, and it was not disputed

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BRADSHAW v. LANCASHIRE AND YORKSHIRE RAILWAY CO.

that he had incurred expenses for medical attendance amounting to 40*l.*, and that the loss occasioned to his estate in respect of his being unable to attend to business previous to his death was 160*l.*

It was contended, however, on the part of the defendants, that the maxim actio personalis moritur cum personâ applied, and that the action was not maintainable; and, secondly, that the damages for loss of business were too remote. The verdict was entered for the plaintiffs for 200*l.*, leave being reserved to the defendants to enter a verdict for themselves or to reduce the damages on the above grounds. It was agreed that the demurrer should abide the event of the argument on the rule.

A rule nisi had been obtained accordingly, against which

Sir J. Holker, S.G., and *R. G. Williams, Q.C.*, shewed cause. This is an action of contract, and a right of action survives to the personal representative in respect of loss arising from the breach of contract in the testator's lifetime. The ground of the action is not the death of the testator. He could clearly have sued for the cause of action declared on in his lifetime, and the contention on the defendants' side must be that his happening to die subsequently destroys that cause of action. There is no principle upon which it should have that effect. The death of the testator destroys that portion of the action which is personal in its nature, viz. the right to recover for the personal injuries; but it leaves intact the cause of action for damage to the personal estate. The decision in *Potter* v. *Metropolitan District Ry. Co.* (1), which was affirmed by the Exchequer Chamber, is an authority for the plaintiffs, as far as it goes, as shewing that the action is in contract: *Alton* v. *Midland Ry. Co.* (2) The damages for loss of business are clearly not too remote. Such damage always forms an element in the assessment of the damages in such cases. [They cited *Knights* v. *Quarles* (3); *Chamberlain* v. *Williamson.* (4)]

Herschell, Q.C., and *J. Edwards, Q.C.*, supported the rule. It is contended that in cases of actions by the personal representatives of persons injured through the negligence of others, and whose injuries have resulted in death, the only right of action is that

(1) 30 L. T. (N.S.) 765.
(2) 19 C. B. (N.S.) 213; 34 L. J. (C.P.) 292.
(3) 2 B. & B. 102.
(4) 2 M. & S. 408.

11 Jur. N.S. 672

given by Lord Campbell's Act, 9 & 10 Vict. c. 93, s. 1. At common law the action for personal injuries dies with the person. The damages in respect of expenses, &c., are in such a case merely subsidiary to the personal injuries, the right of action for which is gone, and must go with such right of action. Otherwise it must be maintained that there are originally two causes of action, one in respect of personal injuries, the other in respect of loss to the personal estate. There is no instance of this cause of action having been maintained heretofore, and yet in most of the cases when a railway accident has caused death there must have been some loss to the personal estate in the injured person's lifetime: *Potter* v. *Metropolitan District Ry. Co.* (1) is distinguishable. The principle of that case has no application whatever to the present. There the wife having sustained personal injuries, the husband's estate was injured, and the husband having died, it was held that the wife, as his personal representative, could recover in respect of the loss to his personal estate. No such point as that taken here could have arisen in that case, for the person whose estate was injured did not die in consequence of the railway accident there. Secondly, the loss to the estate is not recoverable in an action of contract. The principle of *Hadley* v. *Baxendale* (2) applies. The damages are not the natural and direct consequence of the breach of contract, and the defendants had no notice that such damage would be occasioned.

GROVE, J. I am of opinion that this rule should be discharged. The action is brought by the executrix of a person whose death was caused by a railway accident, in respect of damages occasioned to the testator's estate. It is to be taken that the estate was damaged, not consequentially upon the testator's death, but by his inability to attend to his business in his lifetime, the direct and natural result of the injury he suffered. It is no doubt singular that up to the case of *Potter* v. *Metropolitan District Ry. Co.* (1), no action of this kind appears to have ever been brought, a circumstance which has been sometimes relied on as an argument against sanctioning a new form of action. It may, however, be that this is accounted for by the comparative infrequency of accidents of

(1) 30 L. T. (N.S.) 765. (2) 9 Ex. 341; 23 L. J. (Ex.) 179.

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this sort in former times, and the fact that until Lord Campbell's Act the right to damages for the personal injury, as compared with which the damages to the estate would generally be a small matter, was lost by the death of the party injured. The same argument might have been applied to the action in *Potter* v. *Metropolitan District Ry. Co.* (1), up to the decision of which case no action of the kind had ever been heard of, so far as I know, if we except the case put by way of illustration by Richardson, J., in *Knights* v. *Quarles.* (2)

The Court of Exchequer Chamber, nevertheless, held in that case that the action would lie, and by their decision we are bound, unless the present case is so far distinguishable as to render the same principle inapplicable. I am of opinion that it is not, and there is a sufficient ground of action here. The ground of action in both cases is that there has been a breach of a contract made with the testator during his lifetime, whereby in his lifetime his estate was injured by his having to pay medical and other expenses, and injury to his business, the direct and immediate consequence of the accident.

Does the fact that, in this case, besides the injury to the estate, the testator's death has likewise resulted from the breach of contract, make any difference, or does the fact, that provision has been made in such cases for compensation in respect of the death to certain relatives by Lord Campbell's Act, take away any right of action that the executrix would have had but for that Act? It does not seem to me that the Act has that effect, either expressly or by necessary implication. The intention of the Act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the statute should interfere with any right of action an executor would have had at common law. In the case of such right of action he sues as legal owner of the general personal estate which has descended to him in course of law; under the Act he sues as trustee in respect of a different right altogether on behalf of particular persons designated in the Act. Another

(1) 30 L. T. (N.S.) 765. (2) 2 B. & B. 102.

argument for the defendants was, that inasmuch as the remedy for the personal injury died with the person, the damages to the estate, being consequential on the personal injury, died also. I do not at all see that that follows as a necessary or logical consequence. The two sorts of damage are separable: the one is pecuniary loss to the estate immediately and naturally arising out of the accident; the other is personal to the party injured, and as such dies with the person. I do not see that there is any valid distinction between this case and that of *Potter* v. *Metropolitan District Ry. Co.* (1), or why the damage to the estate, that would clearly be recoverable if the injured party lived, should be the less recoverable because of his death. For these reasons, I am of opinion that the action is maintainable. With regard to the distinction between the two classes of damages, it was contended that the damages in respect of the testator's inability to attend to business were too remote within the rule in *Hadley* v. *Baxendale.* (2) The decision there was, that the defendants in an action of contract are only to be liable to the natural consequences flowing directly from their breach of contract, or which may be taken to have been contemplated by the parties. It would be impossible to carry on the affairs of life if a contracting party were liable in respect of extraordinary and unknown sources of damage, a liability for which the consideration given might be wholly inadequate. This doctrine might be applied more plausibly if it were sought to recover consequential damages to the estate arising from the death, but what is here sought to be recovered is the immediate injury to the estate caused in the testator's lifetime by his incapacity to attend to business, the direct result of the accident. Such damages may well be considered as being within the contemplation of the defendants when they entered into the contract. I therefore think that both sorts of damages are recoverable, and that this rule must be discharged.

DENMAN, J. I am of the same opinion. Whatever may be the usual form of action in such cases, it is quite clear that the declaration in this case was framed in contract. The damage alleged was damage to the estate of the testator, and at the trial two

(1) 30 L. T. (N.S.) 765. (2) 9 Ex. 341; 23 L. J. (Ex.) 179.

16 Jur. 358

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BRADSHAW v. LANCASHIRE AND YORKSHIRE RAILWAY CO.

heads of damage were shewn: viz. 160*l.*, damage in respect of the business, which it was agreed had suffered to that amount, and 40*l.*, medical and other expenses. I am of opinion that the plaintiffs are entitled to retain the verdict for the full amount of 200*l.*

The first question was, whether the action can be maintained at all. The action is for a breach of contract occurring in the lifetime of the testator, but which ultimately caused his death. And it was urged that the case fell within Lord Campbell's Act, that the only action that could be brought was under that Act, and that these damages could not be recovered as damages to the estate. This appears, no doubt, to be the first case of similar damages being sued for in an action like the present, but there is considerable authority for holding as we do.

In Williams on Executors, vol. 1, pp. 798, a work in itself of great authority, all the cases on the subject are commented upon and the law is stated entirely in accordance with the dictum of Richardson, J., in *Knights* v. *Quarles.* (1) It is distinctly laid down that an executor may recover damages to the personal estate arising out of a contract, though an action of tort might have been brought for the personal injury, resulting from the same act of the defendant, before the death of the testator. The case of *Alton* v. *Midland Ry. Co.* (2) is also referred to in a note; and it is clear the learned author, who was a judge of this Court, when that case was decided, looked upon the dictum of Willes, J., in that case as a confirmation of the opinion of Richardson, J., in *Knights* v. *Quarles.* (1). He proceeds, however to say that the rule there laid down must be taken to be limited by a qualification introduced by the modern decision of *Chamberlain* v. *Wilkinson* (3), viz. that an action by the executor for breach of contract will not lie where the damage is purely personal, and there is no damage to the estate. In that case the action was for breach of promise of marriage, and the decision turns distinctly on the ground that there was no special damage stated on the record, and so the executor could not have an action because the only damages recoverable were purely personal. Here, the damages are not personal in their nature, but are

(1) 2 B. & B. 102. (2) 19 C. B. (N.S.) 213; 34 L. J. (C.P.) 292.
(3) 2 M. & S. 408.

damages to the estate, and the case falls therefore within the rule as laid down by Sir Edward Vaughan Williams, and not the exception. Again, the case of *Potter* v. *Metropolitan District Ry. Co.* (1), though not exactly in point, is to some extent an authority in favour of the view we take. In one respect it was a stronger case, for it was doubtful there whether the declaration was in contract, whereas it clearly is so here. There the wife was the person to whom the injury was done, and she sued as executrix to her husband who had died, in respect of the damage to the personal estate. The case was not, therefore, one of personal injury ultimately causing death, and consequently is not on all fours with the present. The principle, however, of the decision is quite consistent with our judgment in this case. The rule to enter a nonsuit must for these reasons be discharged.

Then, it being admitted that if the action lies the 40*l.* can be recovered, the only question that remains is, whether the 160*l.* for loss of business can be recovered. It was said that the rule in *Hadley* v. *Baxendale* (2) prevents this amount being recovered. I do not think so. Every plaintiff is entitled to recover the damages that are the natural consequence of a breach of contract. I apprehend that where the contract is to carry a particular man, A. B., safely, and by reason of the breach of such contract A. B. is personally injured, any damage actually caused to the estate of A. B. by his consequent incapacity to attend to business is a natural consequence of the breach of contract, and not too remote, or one which the defendants could say that they did not contemplate. The case is essentially different from that of a contract for the supply of a chattel. It was not suggested at the trial that the damage in question had not actually occurred, or could in any way have been mitigated by hiring a substitute, or otherwise. It appears to me, therefore, that the rule must be discharged on this point also.

Rule discharged.

Attorneys for plaintiffs: *Johnson & Weatheralls, for Shippey.*

Attorneys for defendants: *Clarke, Woodcock, & Ryland, for Grundy & Co.*

(1) 30 L. T. (N.S.) 765. (2) 9 Ex. 341; 23 L. J. (Ex.) 179.

1875
Jan. 28.

DUGDALE and Others *v.* LOVERING.

Indemnity—Implied Contract of—Act done by one Person at another's Request injurious to a third Party.

3 Ch D 733

The plaintiffs were in possession of certain trucks, which were claimed by the defendant, and also by the proprietors of the K. P. Colliery. A correspondence took place between the plaintiffs and the defendant, in which the plaintiffs asked for an indemnity if they should deliver up the trucks to the defendant. The defendant, without giving any answer as to the indemnity, wrote requiring the plaintiffs to send the trucks back to him, which they thereupon did. The K. P. Colliery proprietors then brought an action against the plaintiffs for conversion of the trucks, and their claim proving well founded, the plaintiffs were obliged to pay a sum of money, in settlement of the action, which they sought to recover from the defendant upon a contract of indemnity:—

Held, following the doctrine laid down in *Betts* v. *Gibbins* (2 Ad. & E. 57) and *Toplis* v. *Grane* (5 Bing. N. C. 636), that there was, under the circumstances of the case, evidence of an implied promise to indemnify.

The principle upon which in such cases a contract of indemnity is implied is not confined to cases of principal and agent, or employer and employed.

Declaration in substance stated that the plaintiffs were in possession of certain trucks, and while they were in possession of the same they were claimed by certain persons carrying on business under the style of the Kiveton Park Colliery Company, and, thereupon, in consideration that the plaintiffs would refuse to deliver the trucks to the Kiveton Park Colliery Company and would deliver them to the defendant, the defendant promised to indemnify the plaintiffs for so doing; that the plaintiffs did so refuse to deliver the trucks to the Kiveton Park Colliery Company, and did deliver them to the defendant, and that the persons so carrying on business as the Kiveton Park Colliery Company afterwards brought an action against the plaintiffs for refusing to deliver the trucks to them, and the plaintiffs were obliged to pay a large sum of money to prevent further proceedings in the action and for costs, and that all conditions, &c., were performed, &c., yet the defendant did not indemnify the plaintiffs in respect of the said sum of money.

2nd count for money paid.

Pleas (inter alia), denial of the promise and never indebted.

Issues thereon.

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At the trial the facts were as follows:—The trucks in question were sent to a colliery of which the plaintiffs were owners. While there they were claimed by one Phillips, and also by persons carrying on business as the Kiveton Park Colliery Company, who claimed to have purchased them from Phillips. Phillips' affairs subsequently became the subject of proceedings for liquidation by way of arrangement, and the defendant, who was appointed receiver under the liquidation, claimed the trucks.

A lengthy correspondence took place between the plaintiffs and defendant, the latter demanding the trucks, and the former, on several occasions, asking for an indemnity if they gave up the trucks. The defendant, in answer to the plaintiffs' last letter requesting an indemnity, replied, giving no express answer as to the indemnity, but ordering the trucks to be immediately filled with coal and sent to him. The plaintiffs then sent the trucks to the defendant. The Kiveton Park Colliery proprietors thereupon brought an action of trover against the plaintiffs for conversion of the trucks; and their claim proving well founded, the plaintiffs were obliged to pay a sum of money in settlement of the action, which they now sought to recover from the defendant. On these facts the verdict was entered for the plaintiffs for the amount they had been obliged to pay, leave being reserved to the defendant to move to enter a nonsuit on the ground that there was no evidence of a promise to indemnify. The Court to draw inferences of fact.

A rule nisi had been obtained accordingly, against which

Cave shewed cause. It is contended that where the plaintiff has, at the request of the defendant, delivered up to the defendant goods belonging to a third party, the plaintiff is entitled to an indemnity in respect of an action brought by such third party for the value of the goods so delivered up. It is a general principle of law when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done. The right to an indemnity does not depend in such a case on any

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special relation between the parties such as that of principal and agent. Apart from any such principle, there is sufficient ground for inferring a promise to indemnify in the present case from the correspondence between the parties. [He cited *Betts* v. *Gibbins* (1); *Toplis* v. *Grane* (2); *Adamson* v. *Jarvis* (3); *Humphrys* v. *Pratt.* (4)]

J. Brown, Q.C., and *J. W. Mellor*, supported the rule. The principle relied upon by the plaintiffs only applies as between parties standing in the relation of principal and agent, and employer and employed. The right to indemnity in such cases grows out of the contract of employment. The authorities cited have no application to the case of perfectly independent parties, between whom there is no special relation arising out of any contract. It is unreasonable in such a case to imply a promise to indemnify from the mere fact that a party claims goods to which he conceives himself entitled. If in such a case the party claiming the goods expressly refuses to indemnify, a promise to indemnify could not be implied. The utmost the authorities establish is, that if the plaintiff gives up the goods under circumstances which justify him in supposing that he is to be indemnified he will be entitled to an indemnity. Here the proper construction of the correspondence is that the defendant expressly refused an indemnity, or, at all events, that the plaintiffs were not entitled to assume that he would give one. The only authority cited which was not a case of agency is *Humphries* v. *Pratt.* (4) But there the defendant represented to the plaintiff, the sheriff, that the goods belonged to the execution debtor, and so took on himself the responsibility in case they turned out not to do so. [They also cited Story on Agency, s. 339.]

BRETT, J. I am of opinion that this rule should be discharged. The Court is not entitled to enter a nonsuit if there was reasonable evidence for the jury of a contract to indemnify. It is clear from the correspondence that the plaintiffs delivered these trucks to the defendant upon the request of the defendant, and it is also clear that they belonged in truth to the Kiveton Park Colliery

(1) 2 Ad. & E. 57.
(2) 5 Bing. N. C. 636.
(3) 4 Bing. 66.
(4) 5 Bli. (N.S.) 154.

Company, who have made the plaintiffs answerable for such delivery. Under these circumstances, does there arise an implied promise by the defendant to indemnify the plaintiffs? In *Adamson* v. *Jarvis* (1) the declaration was in case, and stated the facts which had arisen, and they were these:—The plaintiff was an auctioneer, and the defendant had directed him as such auctioneer to sell certain cattle. The plaintiff did thereupon sell them, and it turned out that they did not belong to the defendant, but to another person. The owner having made the plaintiff responsible, the plaintiff sued the defendant in case for an indemnity. The Court there held that there was evidence on these facts from which the jury might say that the plaintiff, having acted on the request of the defendant, was entitled to assume that if what he did turned out to be wrongful as against a third party, he would be indemnified by the defendant. In this case the plaintiff was the defendant's agent. In *Humphrys* v. *Pratt* (2) the plaintiff was the sheriff to whom the defendant had given a fi. fa. to execute. If he had executed it on cattle as belonging to the execution debtor without more, he could not have claimed indemnity, but the defendant pointed out to him the particular cattle as being the debtor's. The House of Lords held that an indemnity might be implied. In neither of these cases is it stated that the plaintiff at the time he committed the tortious act knew of any claim by a third person, nor was any such fact relied on in the judgments. The implication is not made to rest on the fact of the plaintiff's being an agent, or on notice of the third party's claim, but merely on the fact of the plaintiff having done an act at the request of the defendant which was not manifestly illegal or tortious to his knowledge, but which exposed him to an action. After those cases came that of *Betts* v. *Gibbins*. (3) There the plaintiff had delivered to the defendant at his request certain goods which belonged to a third party. There again it was held that a promise to indemnify might be implied, and this decision was not put on the ground of agency. After the judgment in *Betts* v. *Gibbins* (3), which, following the two former cases, laid

(1) 4 Bing. 66. (2) 5 Bli. (N.S.) 154.
(3) 2 Ad. & E. 57.

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down the principle upon which the implication of an indemnity arises in the broadest terms, there came the case of *Toplis* v. *Grane* (1), in which Tindal, C.J., one of the most careful expositors of the law ever known, laid down the proposition on the subject in these terms:—"We think this evidence brings the case before us within the principle laid down in *Betts* v. *Gibbins* (2), that when an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yet if such an act is not apparently illegal in itself, but is done honestly and bonâ fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof." It is urged on the part of the defendant that there is no authority for such an indemnity except in the case of agents. But in none of these cases, as I have observed, was the fact of agency relied on. Unless, therefore, the correspondence here is conclusive to shew that the plaintiffs did not rely on an indemnity from the defendant, it seems to me that the other facts in the case are evidence on which the jury might find an implied promise to indemnify. It was argued that the correspondence was conclusive to shew that the plaintiffs did not rely on an indemnity. It seems to me that so far from this being so, if the case stood on the construction of the correspondence alone, the jury might have implied from it a promise to indemnify the plaintiffs if they would deliver up the waggons. The correspondence shews that the plaintiffs for a long time were hesitating whether to give up the waggons, and gave the defendant notice that if they did they should look to him to hold them harmless. The defendant avoided answering such notice definitely; and eventually, without saying whether he would give an express indemnity or not, made a request to the plaintiffs to send the waggons, which the plaintiffs complied with. From these letters I think the jury might well have found that the plaintiffs were justified in believing, and did believe, that the defendant would indemnify them if they incurred liability. It is not necessary, however, in my opinion, to determine more than that the correspondence did not conclusively shew that the plaintiffs were not relying on an

(1) 5 Bing. N. C. 636. (2) 2 Ad. & E. 57.

indemnity. For these reasons I think the argument for the defendant has failed, and that the judge could not have nonsuited the plaintiffs.

GROVE, J. I am of the same opinion. The plaintiff's counsel cited four cases in support of the proposition that either the law inferred, or the jury might find upon the facts proved, an implied promise on the part of the defendant to indemnify the plaintiffs. Now these cases seem to me to make out the proposition, at all events, that the jury might infer such a promise. The passages cited from *Betts* v. *Gibbins* (1), and *Toplis* v. *Grane* (2), are very explicit to the effect that when acts are done by one person at the request of another, which are not apparently illegal, a promise to indemnify may be inferred. The counsel for the defendant did not dispute the correctness of these decisions, but urged that in three out of the four the case was one of principal and agent, or employer and employed, and that the expressions used in the judgment, having primâ facie a wider application, must be limited to such cases.

In some cases, no doubt, a general proposition stated in a judgment must be limited by reference to the subject-matter, but that is where the proposition would be obviously unreasonable unless so limited. I do not find that in these cases there is anything to shew that the expressions must be limited to the case of agency. I should hesitate to say that in cases of this sort it can be an absolute proposition of law that the party making the request is bound to indemnify. Whether there is such an obligation must greatly depend on the circumstances of each individual case, the effect of which seems to be for the jury to determine. All I wish to be considered as deciding is that in the present case there was reasonable evidence for the jury of an implied contract of indemnity. The case turns in great measure on the correspondence, the substance of which is as follows:—The defendant claims the trucks, which are also claimed by the Kiveton Park Colliery Company. It has been urged that the plaintiffs had greater means of knowledge as to the ownership of the trucks than the defendant.

(1) 2 Ad. & E. 57. (2) 5 Bing. N. C. 636.

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I cannot see any reason why this should be assumed to be so; primâ facie the trustee who represented the person formerly their owner should have known more about them than the plaintiffs, to whose colliery they were sent to be filled. These conflicting claims being made to the trucks, the plaintiffs state that they do not like giving them up without an indemnity. They state this in several letters, but the defendant does not reply explicitly, but ultimately he sends a letter, which may be more appropriately termed an order than a request, to send the waggons back. Is it not a question for the jury whether, when the defendant thus somewhat peremptorily ordered the waggons to be returned, he did not impliedly assent to the plaintiffs' request for an indemnity? He certainly did not express dissent in any way, and it does not appear altogether unreasonable to say that the plaintiffs were entitled to infer from the correspondence, coupled with the facts, that he assented. With regard to the effect of the previous claim by the Kiveton Park Colliery Company, it seems to me to cut both ways. It may be urged, on the one hand, that the plaintiffs having notice, acted with their eyes open, and were not entitled to rely on the defendant's assertion of right to the property; on the other hand, the defendant having ordered the goods to be sent to him, with notice that they were claimed by another, acted with knowledge of the risk that the plaintiffs incurred. And this may perhaps be said to make it more reasonable to infer a promise to indemnify against him. On the whole, I am clearly of opinion that there was ample evidence to support the finding of the jury, and that we cannot therefore enter a nonsuit.

Rule discharged.

Attorneys for plaintiffs: *Power, Andrew, & Wood.*
Attorneys for defendant: *Linklaters & Co.*

BALMAIN *v.* LICKFOLD AND OTHERS. 1875.

Jan. 15

Costs—Certificate under 30 & 31 *Vict. c.* 142, *s.* 5—*Plea of Non-joinder of Co-contractors—Amendment under s.* 38 *of the Common Law Procedure Act,* 1852.

The plaintiff brought an action against A. to recover 356*l.* 7*s.* for coals sold and delivered. On the same day as that on which the writ was issued A. sent the plaintiff a cheque for 319*l.* 3*s.* 8*d.*, which he received on the following day, and acknowledged as received on account. The plaintiff declared against A., who pleaded in abatement the non-joinder of two co-contractors, B. and C. The plaintiff thereupon amended his writ and declaration under s. 38 of the Common Law Procedure Act, 1852, by adding B. and C. as defendants; and the three defendants pleaded payment into Court of 1*l.* 6*s.* 11*d.*, payment as to the residue, and never indebted. The cause was referred to an arbitrator, the costs to abide the event of the award, and the arbitrator to have power to amend and to certify for costs.

The arbitrator amended the plea of payment according to the facts, by making it a plea of payment (except as to 1*l.* 6*s.* 11*d.*) by A. after the issuing of the writ, and before the plea in abatement, and before the action was commenced as against the other two defendants by the amendment; and as to the first issue he found by his award that the defendants were indebted to the plaintiff in the sum of 322*l.* 4*s.* over and above the 1*l.* 6*s.* 11*d.* paid into Court; as to the issue on the amended plea, he found that the defendants satisfied and discharged 319*l.* 3*s.* 8*d.*, parcel of the claim, by payment; and he directed the verdict to be entered for the plaintiff with damages 3*l.* 0*s.* 4*d.*, being the difference between the two sums of 322*l.* 4*s.* and 319*l.* 3*s.* 8*d.*, and being in addition to the 1*l.* 6*s.* 11*d.* paid into Court; and he refused to certify for costs under 30 & 31 Vict. c. 142, s. 5:—

Held, that, the plaintiff having recovered in the action against the three defendants less than 20*l.*, he was not, in the absence of a certificate, entitled to the costs of the cause even as against A.

THE writ in this action was originally issued on the 11th of February, 1874, against G. Lickfold as sole defendant, specially indorsed with particulars of the plaintiff's claim for coals sold and delivered, amounting to 356*l.* 7*s.* According to the affidavit filed on the part of the plaintiff, the writ was served on the defendant Lickfold by leaving it for him at his place of business in Chancery Lane on the same day: according to the affidavit of Lickfold's clerk, it was served by leaving it with him on the 13th of February. On the 11th of February, a cheque for 319*l.* 3*s.* 8*d.* upon the Islington Branch of the National Provincial Bank of England was sent by post by the defendant Lickfold to the plaintiff at Stoke-upon-Trent, and was received by him on the 12th, the receipt of it being acknowledged by the plaintiff by post on the same day

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as being received on account only of his claim. The defendant entered an appearance to the writ, and the plaintiff delivered a declaration on the 26th of February. On the 2nd of March the defendant Lickfold pleaded in abatement the non-joinder of two co-contractors, Hall and Higley. The plaintiff thereupon, on the 11th of March, amended the writ and declaration pursuant to s. 38 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), by adding the names of Hall and Higley as co-defendants. The three defendants, on the 6th of May, pleaded to the amended declaration a plea of payment into Court of 1*l.* 6*s.* 11*d.*, and also pleas of payment before action as to the residue of the plaintiff's demand, and never indebted. Issues were joined upon these pleas, and the cause came on for trial at the summer assizes at Maidstone, when it was referred to an arbitrator, upon the terms, amongst others, that the costs of the cause and the costs of the reference and award should abide the event of the award, and that the arbitrator should have power to certify.

The arbitrator by his award, recited that upon the hearing of the reference he did, upon the application of the defendants' counsel, amend the plea of payment by substituting for that plea, as pleaded, the words following, that is to say, "and for a second plea, except as to 1*l.* 6*s.* 11*d.*, parcel of the money claimed, the defendants say that after the writ in this action was issued against the defendant Lickfold, and before the defendant pleaded in abatement the non-joinder of the other defendants, and before the action was commenced against the other defendants by amendment made pursuant to the 38th section of the Common Law Procedure Act, 1852, the defendants satisfied and discharged the claim of the plaintiff herein pleaded to by payment," and awarded as follows: "As to the issue firstly joined, I award and find that the defendants were indebted to the plaintiff in the sum of 322*l* 4*s.* over and above the said sum of 1*l.* 6*s.* 11*d.* paid into Court: and as to the issue secondly joined, being the issue taken on the amended plea, I award and find that the defendants did, as in the said plea alleged, satisfy and discharge by payment the sum of 319*l.* 3*s.* 8*d.*, parcel of the claim of the plaintiff therein pleaded to, and did not so satisfy and discharge the residue of the claim therein pleaded to: and I further award and

direct that the verdict entered for the plaintiff do stand, but that the entry of damages be reduced to the sum of 3*l.* 0*s.* 4*d.*, being the difference between the two sums of 322*l.* 4*s.* and 319*l.* 3*s.* 8*d.* above mentioned, and being in addition to the said sum of 1*l.* 6*s.* 11*d.* paid into Court; and I give no certificate as to costs."

The master having refused to tax the plaintiff's costs of the cause and of the reference and award, as against Lickfold,

Bennett, in Michaelmas Term last, obtained a rule calling on the defendant Lickfold to shew cause why such costs should not be taxed. He cited *Cazneau* v. *Morrice*. (1)

J. Brown, Q.C., and *Lucius Kelly*, shewed cause. The plaintiff not having recovered in the action a sum which by 30 & 31 Vict. c. 142, s. 5, entitled him to costs, the master was right in declining to tax. Sect. 38 of the Common Law Procedure Act, 1852, enacts that "in any action on contract, where the non-joinder of any person or persons as a co-defendant or co-defendants has been pleaded in abatement, the plaintiff shall be at liberty, without any order, to amend the writ of summons and the declaration, by adding the name or names of the person or persons named in such plea in abatement as joint contractors, and to serve the amended writ upon the person or persons so named in such plea in abatement, and to proceed against the original defendant or defendants and the person or persons so named in such plea in abatement: provided that the date of such amendment shall, as between the person or persons so named in such plea in abatement and the plaintiff, be considered for all purposes as the commencement of the action." The writ was issued on the 11th of February. The amendment, by adding Hall and Higley as co-defendants, was made on the 11th of March. Under the old practice, on a plea of non-joinder, the plaintiff had to issue a fresh writ. Now, he merely adds the persons named in the plea, and the date of the amendment becomes the date of the commencement of the action.

[KEATING, J. "As between the person or persons named in the plea in abatement and the plaintiff." The suggestion is that that does not apply to the defendant originally named in the writ.]

(1) 25 L. J. (Q.B.) 126.

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There could be no judgment here except against all three defendants; and, if the plaintiff is entitled to costs at all, he will be entitled as against all three; which is directly in the teeth of s. 39. (1) Against two of them the plaintiff has recovered 4*l.* 7*s.* 3*d.* only. Sect. 5 of 30 & 31 Vict. c. 142, enacts that if, in any action commenced in any superior Court of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs." There is nothing in the award to shew that the plaintiff has recovered in the action upon which the award is founded more than 4*l.* 7*s.* 3*d.* The judgment is against the three for that sum; and the costs follow the judgment. *Cazneau* v. *Morrice* (2) is wholly beside this question.

Bennett, in support of the rule. In *Cazneau* v. *Morrice* (2), Crompton, J., bases his judgment on this, that the plaintiff, "being entitled to no judgment for damages, can have no costs under the Statute of Gloucester." The present case, however, does come within the Statute of Gloucester.

[GROVE, J. Then it comes within 30 & 31 Vict. c. 142, s. 5.]

(1) Which enacts that, "in all cases after such plea in abatement and amendment, if it shall appear upon the trial of the action that the person or persons so named in such plea in abatement was or were jointly liable with the original defendant or defendants, the original defendant or defendants shall be entitled as against the plaintiff to the costs of such plea in abatement and amendment; but, if at such trial it shall appear that the original defendant or any of the original defendants is or are liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same, together with the costs of the plea in abatement and amendment, as costs in the cause against the original defendant or defendants who shall have so pleaded in abatement the non-joinder of such person: Provided that any such defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement."

(2) 25 L. J. (Q.B.) 126.

Taking the whole award together, the arbitrator in effect finds that at the commencement of the action the defendants were indebted to the plaintiff in the sum of 322*l.* 4*s.* over and above the 1*l.* 6*s.* 11*d.* paid into Court, and that the defendants after the commencement of the action satisfied and discharged the plaintiff's claim to the extent of 319*l.* 3*s.* 8*d.* As against Lickfold, at all events, this was a payment after the commencement of the action. Sect. 39 of the Common Law Procedure Act, 1852, contemplates a different liability in the several defendants. The amendment makes the writ enure as a new writ as against Hall and Higley, but not as against the original defendant, Lickfold.

[LORD COLERIDGE, C.J. The finding of the arbitrator is that the defendants were indebted to the plaintiff in the sum of 323*l.* 10*s.* 11*d.*, and that they are indebted to him in the sum of 3*l.* 0*s.* 4*d.*; and he gives his award for that sum.]

The payment being after action, the case comes within s. 68 of the Common Law Procedure Act, 1852, which enacts that "any defence arising after the commencement of any action shall be pleaded according to the fact, without any formal commencement or conclusion; and any plea which does not state whether the defence therein set up arose before or after action shall be deemed to be a plea of matter arising before action."

[LORD COLERIDGE, C.J. You assume erroneously that the payment was after action. This action was brought on the 11th of March.]

As against Lickfold, at all events, it was after action.

LORD COLERIDGE, C.J. I am of opinion that this rule should be discharged. The action was originally brought by the plaintiff against one of the defendants, Lickfold, to recover 356*l.* 7*s.* for coals sold and delivered. Contemporaneously with the issuing of the writ, a cheque for 319*l.* 3*s.* 8*d.* was sent to and received by the plaintiff. The defendant Lickfold pleaded in abatement that Hall and Higley were jointly liable with him. The plaintiff thereupon amended the writ and declaration pursuant to s. 38 of the Common Law Procedure Act, 1852, and went on against the three defendants. The defendants pleaded to the amended

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declaration a plea of payment into Court of 1*l.* 6*s.* 11*d.*, and also never indebted, and a general plea of payment of the residue. Issues having been joined upon these pleas, the cause was referred, and, at the request of the defendants, the arbitrator amended the plea of payment by alleging, according to the fact, that the payment was made by Lickfold after the issuing of the writ against him, and before the plea in abatement, and before the action was commenced against the other defendants by the amendment under the statute. He then proceeded to award as follows:—"As to the issue firstly joined, I award and find that the defendants were indebted to the plaintiff in the sum of 322*l.* 4*s.* over and above the 1*l.* 6*s.* 11*d.* paid into Court: and as to the issue secondly joined, being the issue taken on the amended plea, I award and find that the defendants did, as in the plea alleged, satisfy and discharge by payment the sum of 319*l.* 3*s.* 8*d.* parcel, &c., and did not so satisfy and discharge the residue of the claim therein pleaded to:" and he directs that the verdict for the plaintiff shall stand, but that the damages be reduced to 3*l.* 0*s.* 4*d.*, being the difference between the two sums of 322*l.* 4*s.* and 319*l.* 3*s.* 8*d.*, and being in addition to the 1*l.* 6*s.* 11*d.* paid into Court. But, thinking that it was inequitable for the plaintiff to go on with the action, he declined to certify for costs. Mr. Bennett says the plaintiff was entitled to costs because he recovered more than 20*l.* in the action. The answer, however, to that is that that is not so. The proceeding in the action which was referred was against the three defendants; and the award is against the three substantially for 4*l.* 7*s.* 3*d.* only. That, therefore, is all that was recovered in the action. The 30 & 31 Vict. c. 142, s. 5, deprives the plaintiff of costs unless there is a certificate.

KEATING, J. I am of the same opinion. The action in which the judgment is recovered is an action against the three defendants: and the last County Court Act says that where a plaintiff recovers in contract a sum not exceeding 20*l.*, there shall be no costs, in the absence of a certificate. That is this case. Whether the plaintiff by any other application ought to have the costs of

the amendment as against Lickfold, we are not now to consider. All we decide is, that the plaintiff has not recovered more than 20*l.* in the only action in which there is a verdict, and therefore that the plaintiff is entitled to no costs.

GROVE, J. I am of the same opinion. All that was really recovered by the plaintiff in this action was 4*l.* 7*s.* 3*d.*

DENMAN, J. I am entirely of the same opinion. *Cazneau* v. *Morrice* (1) is wholly inapplicable, and throws no light upon this case. The sole question is how much the plaintiff has recovered by the award of the arbitrator in this action. That was 3*l.* 0*s.* 4*d.*, in addition to the 1*l.* 6*s.* 11*d.* paid into Court. The arbitrator thought there was no sufficient reason for bringing the action in the superior Court, and therefore he refused to certify to give the plaintiff costs. I think we should be doing wrong if we were to take upon ourselves to grant costs where the tribunal which had the power to certify for them has declined to do so.

Rule discharged, with costs.

Attorney for plaintiff: *Herbert Wright.*
Attorney for defendant: *R. Hewlett.*

CLEMENTSON *v.* MASON.

Feb. 25.

Parliamentary and Municipal Elections—Right of Candidate to be present in Polling Station—Ballot Act, 35 & 36 *Vict. c.* 33, *s.* 9—*Rules* 21 *and* 51.

A candidate at a parliamentary or municipal election has a general right to be present in a polling station at the election, and not merely a qualified right to be present for the purpose of undertaking the duties of an agent, or of assisting his agent.

DECLARATION for an assault.

Plea of justification under 35 & 36 Vict. c. 33, s. 9.

Issue.

The facts alleged in the plea as amounting to a justification and as proved at the trial before Denman, J., at the last Manchester Spring Assizes, sufficiently appear from the judgments.

(1) 25 L. J. (Q.B.) 126.

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The verdict was entered for the defendant, with leave to the plaintiff to move to enter it for himself for 40*s.* damages; the Court to draw inferences of fact. A rule *nisi* was obtained accordingly, against which

Pope, Q.C., and *Edwards, Q.C.*, shewed cause. It is contended that when the candidate has appointed an agent he has no right to be present himself at a polling booth except for the purpose of assisting his agent. The claim here was not to be present to assist the agent, but the candidate asserted a general right to be present. It is obvious that some of the chief mischiefs which the Ballot Act was intended to prevent would in many cases arise if the candidate were allowed to be present. If the candidate was a large employer of labour, his presence would be calculated to overawe and unduly influence voters. No suggestion is made here that the plaintiff came for the purpose of assisting or supervising the proceedings of his agent. He claims a right to be present at the polling for other purposes. This is plainly inconsistent with the whole scope of the Act. The provision of the 51st rule, that "the candidate may be present at any place at which his agent may in pursuance of the Act attend," must be read as referring to the previous part of the rule, and meaning that he may be present for the purpose of undertaking the duties of an agent or of assisting his agent. (1)

Sir J. Holker, S.G., and *Baylis*, supported the rule. The provisions of the 51st rule cannot be qualified as suggested. The candidate has an undoubted right, in any view of the Act, to be present to supervise or assist his agent, and the strict meaning of the words entitles him to be present without relation to the purpose for which he is present.

It is practically impossible to discriminate as to the purpose for which he is present. He may come to see how his agent is doing his duty, and his right to be present cannot depend on the mere existence or non-existence of a statement to the presiding officer that he has come for that purpose. What power is given to such officer to judge of the purpose for which he has really come? The

(1) In the course of the argument the effect of the various sections of the Ballot Act was elaborately discussed, but the judgments go so fully into the various provisions of the Act that it has been thought unnecessary to set out the arguments at length.

practical impossibility of discriminating as to the purpose for which he is entitled to be present makes it reasonable to suppose that the strict grammatical construction of the words was what the legislature really intended.

Cur. adv. vult.

Feb. 25. The following judgments were delivered:—

BRETT, J. This action was brought in the form of an action for an assault, to try the question whether, in the particular case, the defendant, the returning or presiding officer acting in a polling station at a municipal election, was justified under the circumstances in forcing the plaintiff, a candidate, to leave a polling station.

The facts in substance were that the plaintiff, a candidate, being present in a polling station whilst the polling was proceeding, was asked by the defendant, the returning officer, whether he claimed to be present in order to act on his own behalf instead of appointing an agent, or in order to assist an agent appointed by him. The plaintiff stated that he did not claim a right to be present for either of such particular purposes, but that he did claim the right to be present from the mere fact of his being a candidate. The plaintiff was not in any way misconducting himself, or interfering with the polling or the electors. The defendant denied the plaintiff's right to be present on the mere ground of his being a candidate, ordered him to quit the polling station, and, on his refusal, directed him to be removed.

The question, therefore, in this case is, whether, upon a true construction of the Ballot Act (35 & 36 Vict. c. 33), a candidate at a municipal election has a right, as such, without in any way interfering or attempting to interfere with the polling or the electors, or in any other way misconducting himself, to be present in the polling station during the polling.

The polling at a parliamentary contested election is now regulated entirely by the Ballot Act and its schedules, and such parts of former Acts as are incorporated into it. The polling at a municipal contested election is regulated by the Ballot Act, its schedules, and the Municipal Corporation Act (5 & 6 Wm. 4, c. 76), as altered by the Ballot Act in its fourth schedule. In both cases it is necessary to interpret the Ballot Act.

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By s. 2 of the Ballot Act, "in the case of a poll at an election (i. e. a parliamentary or municipal election), the votes shall be given by ballot." Where, then, there is a poll in either election, we are at once driven to the Ballot Act to seek in it and its schedules the form and course of proceedings in taking the poll and determining and declaring its result. We need not consider the mode of "nomination," otherwise than by stating that by rule 1 of schedule 1 a place is appointed for the election, i. e. "the nomination." By s. 5 of the Act, there are to be "polling districts," and in each district a "polling place." By s. 8 of the Act and rule 15 of the schedule, the returning officer shall, at every polling place, provide a sufficient number of "polling stations." By rule 32, the returning officer must appoint and give notice of a "place for counting the votes." There are, therefore, three kinds of places: the place of nomination, the polling stations, and the place for counting the votes. The places being thus fixed, the Act next provides for the persons who are to take part in the taking of the poll and the ascertaining and declaring its result. By s. 8 the returning officer may, under certain circumstances, appoint a "deputy." By rule 21, he shall appoint a "presiding officer" to preside at each station. By rule 48, he may, in addition to any "clerks," appoint "persons to assist him in counting the votes." By rule 50, "the presiding officer" may do certain things "by the clerks appointed to assist him." The officials, therefore, on the part of the returning officer are, himself or deputy, presiding officers, clerks, and assistants. Then there are "the agents of the candidates." By rule 57, the expression "agents of the candidates" used in relation to a "polling station," means agents appointed in pursuance of 6 & 7 Vict. c. 18, s. 85. These are the agents who are usually called "personation agents." They attend only at polling stations. By rule 31, the candidates may respectively appoint "agents to attend the counting of the votes." These two kinds of agents are the only agents who can take part for the candidates in the taking the poll or ascertaining and declaring its result. We thus have the persons who are to take part in the polling, &c.

We must next consider the rules which are to govern the conduct of all these persons. By rule 54, every returning officer, and

every officer (i. e. deputy returning officer or presiding officer), clerk, or agent authorized to attend at a polling station or at the counting of the votes, shall, before the opening of the poll, make a "statutory declaration of secrecy." The form of such declaration is given in schedule 3, and declares that the declarant will not do anything forbidden by s. 4 of the Act. Now, by s. 4, in the first place, "every officer, clerk, and agent in attendance at a polling station shall maintain, &c., the secrecy of the voting in such station, &c., and shall not communicate, &c., before the poll is closed, to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper, or voted, at that station," &c. This enactment is plainly pointed, not only to secrecy as to the way in which an elector has voted (secrecy as to that is to be maintained for ever), but it requires secrecy until the poll is closed as to the names, not only of those who have voted, but of those who have not offered to vote. The intention, as to these last, must be to prevent pressure being put upon those electors who do not wish to vote. The persons towards whom this secrecy should, it would seem, be most observed are, the candidate and his canvassing agents. This part of the section does not name or of itself include the candidate. The second enactment in the section is that "no such officer, clerk, or agent, and no other person whatsoever, shall interfere with or attempt to interfere with a voter when marking his vote, &c., or communicate at any time to any person any information obtained in a polling station as to the candidate for whom any voter in such station is about to vote or has voted," &c. This part may include the candidate, if he may be present in the station. The section then enacts that "every officer, clerk, and agent in attendance at the counting of the votes shall maintain, &c., the secrecy of the voting," &c. This part, again, does not of itself include the candidate. The section then again alters its phraseology, and says that "every person who acts in contravention of the provisions of this section shall be liable, &c., to imprisonment." This may include a candidate, and does include him if, under the middle part of this section, or, by reason of being admitted under other sections to a polling station or to the place of counting the votes, he is enabled to and does contravene the secrecy enjoined by this section.

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But, if he may be present at either place, there is nothing which obliges him to make the statutory declaration of rule 54, or which enables any one to administer it to him. So far, his presence does not seem to be contemplated; the inconvenience of it is not provided for. So, in s. 11, the wilful misfeasance or wilful act or omission in contravention of the act of others is made subject to a penalty of 100*l.*; but any such misfeasance or act of the candidate is not made liable. The words are, "every returning officer, presiding officer, and clerk who is guilty," &c. By s. 9, however, "If any person misconducts himself in the polling station, or fails to obey the lawful orders of the presiding officer, he may immediately, by order of the presiding officer, be removed," &c. The candidate is included in this, if he may be and is present.

Having thus far considered the places prepared for and the persons who may take part in the polling and the ascertaining and declaring its result, we must now consider what things may be done in such places, and in whose presence such things may be done.

Rule 8 enacts what is to be done at the place of election or nomination, and in whose presence:—"The candidate, &c., and his proposer and seconder, and one other person selected by the candidate, and no person other than aforesaid, shall, except for the purpose of assisting the returning officer, be entitled to attend," &c. Here, where the candidate is to attend, he is expressly mentioned. Sect. 4 describes persons who may be present at a polling station. The candidate, as has been pointed out, is not mentioned in the section, though he may be included in some part of it. Rule 21 is an excluding rule:—"The returning officer shall appoint a presiding officer to preside at each station, and the officer so appointed shall keep order at his station, shall regulate the number of electors to be admitted at a time, and shall exclude *all other persons except the clerks, the agents of the candidates, and the constables on duty.*" This, if it stood alone, or if it did not by reason of other enactments require necessarily a limitation, would clearly exclude the candidate. But it will be seen that some words at all events of limitation must be introduced. The question will be what words.

Turning next to what is to be done at the place of counting the

votes,—by s. 2 "the counting is to be in the presence of such agents, if any, of the candidates as may be in attendance." Those are the agents appointed under rule 31. By rule 33, "the returning officer, his assistants and clerks, and the agents of the candidates, *and no other person, except with the sanction of the returning officer*, may be present at the counting of the votes." This rule, again, if words of limitation were not necessarily to be added to it, would clearly exclude the candidate. But here, too, it will be seen that some words of limitation must be added.

Before, however, coming to the material and difficult rule which we must interpret, we must notice rule 26. By that rule (r. 26), "The presiding officer, on the application of any voter who is incapacitated by blindness or other physical cause from voting in manner prescribed, &c., or of any voter who makes such a declaration as hereinafter mentioned that he is unable to read, shall, in the presence of the agents of the candidates, cause the vote of such voter to be marked on a ballot-paper *in manner directed by such voter*," &c. It is obvious that, if the candidate be present during this operation, he will know whether such voter votes for or against him. It seems insufficient to say that the candidate, if he disclosed his knowledge to any one else, as, for example, to the voter's employer, might incur a penalty under s. 4. If the voter were under his own influence, he might act on his own knowledge without any disclosure to any one, and therefore without any penalty. If, therefore, there were not circumstances under which by clear enactment in this statute this mischief must arise by reason of the candidate's presence, the existence of this section would give strong ground for excluding a candidate from the polling station. Everything hitherto considered, indeed, seems to be against the right of the candidate to be present except at the nomination; and in that case his presence is admitted by express affirmative words.

But now we come to rule 51, which deals expressly with the candidate and with his right to be present. The very question of his presence is before the legislature. By rule 51, "A candidate may himself undertake the duties which any agent of his, if appointed, might have undertaken, or may assist his agent in the performance of such duties, and may be present at any place at

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which his agent may, in pursuance of this Act, attend." The duties here mentioned are the duties of the personation agent at the polling station, and of the agent appointed to attend at the counting of the votes. The candidate may, then, under certain circumstances at all events, be present in the polling station and at the place of counting. In certain circumstances, then, he may be present without making any statutory declaration. In certain circumstances, he may be present whilst the returning officer is taking the direction of a voter under rule 26. The mischiefs pointed out if the presence of the candidate be allowed, and which seemed to be reasons for disallowing his presence, do not, under certain circumstances, prevent his presence from being allowed. And it is now obvious that some words, at all events, must be added to the exceptions in rules 21 and 33; you must at least add the words, "and the candidates, if they undertake the duties, &c., or if they desire to assist their agents." Unless words be added in rule 51, the phraseology admits the candidate, as such, to the polling stations and the place of counting the votes. Unless in the last phrase of the rule you add the words "for such purposes," that last phrase of the rule admits the candidate, as such, to any place at which his agent may attend, that is to say, to the polling stations and the place for counting the votes. If the section be considered by itself, the first matter to be determined is, what is the meaning in it of the word "undertakes." "A candidate may himself *undertake* the duties," &c. That may mean that the candidate may engage that he will fulfil, or declare that it is his intention to fulfil the duties, or that he may fulfil or begin to fulfil the duties. If it means the first, the sentence, so far, does not enable the candidate to be present in the polling station; then the last sentence of the section is required to complete the idea of enabling the candidate, not only to engage to fulfil, but also to fulfil, the duties. The second part, however, is,—"or may assist his agent in the performance of such duties." Now, the candidate cannot assist without being present. That part of the section, therefore, carries with it necessarily the presence of the candidate. But it is coupled with the former part by the conjunction "or." And the third part, if it is to be read with one of the former parts so as to make it complete, should, according to ordinary rules of

grammar, be read also with the other. It cannot be read with the second as part of it, without manifest tautology; and yet, if it be read with the first, it must also be read with the second. It must be treated, if the suggested words of limitation be added to it, as tautologous, and if the suggested words be not added, it must be treated as enabling something separate and additional. If the latter, it gives to the candidate the right which is claimed for him, of being present as such in any polling station and at the place of counting the votes. Whichever way this rule be read, words must be added to rules 21 and 33.

The final question then is, whether words should be also added to this rule 51. Nothing can be more difficult to determine. If the candidate has this absolute right, it is a useless and barren right to him, unless it be that it will give him the power of dealing with a servant or tenant of his own, either for not coming to vote at all, or, if the servant or tenant be illiterate, or blind, or unable from physical defect to make a mark, for voting against him. Can it be that the words are to be construed so as to give him such a barren and useless or mischievous right, when all the other provisions of the statute seem to ignore or militate against such a right? With much distrust, I come to the conclusion that, whatever the real intention may have been, our duty is to stand by the ordinary and grammatical construction of the last sentence in the rule, as there is no overwhelming ground for otherwise interpreting it. This is the rule of construction which this Court has before declared must be rigidly applied to statutes of this kind.

Although there are strong grounds, to be collected from the consideration of other parts of the statute and its schedules, for suspecting that the intention was to give only a limited right to the candidate of being present, as such, at the polling stations and at the place for counting the votes, still there is nothing to make it sufficiently certain that the words ought not to be construed according to their ordinary and grammatical signification: and then they signify that the candidate may, as such, be present at any polling station and at the place of counting the votes. The word "candidates" is the word which must be read into the exceptions in rules 21 and 33. Nothing must be read into this rule 51.

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All the above reasoning has been applied to a parliamentary contested election. It was not argued that there is a difference in this matter in a municipal contested election.

What is the exact effect of subs. 6 of s. 20, we are not at present called upon to say.

I am of opinion that the rule must be made absolute.

I think it right to add that Sir Henry Keating, who heard the argument, has read this judgment, and expressed his entire concurrence in it. (1)

DENMAN, J. I should have been perfectly contented in this case to have said that I entirely agree with my Brother Brett's judgment; but, inasmuch as this is a case of first impression, and also a case of some importance, and inasmuch as at the trial I ruled the other way, I think it is desirable that I should read the judgment which I have prepared, as shewing the process by which my mind has been brought to the same conclusion as that to which my Brother Brett and my Brother Keating have arrived.

This was an action brought by the plaintiff for an assault in causing him to be removed from a polling station during a municipal election at Ashton-under-Lyne. The plaintiff was a candidate at the election; and the defendant was the returning officer. Several pleas were pleaded; but the only one relied upon on the argument of the rule was one added at the trial, raising a defence under the Ballot Act, 35 & 36 Vict. c. 33, s. 9, which authorizes the removal from the polling-station, by a constable, of any person who fails to obey the lawful orders of the presiding officer.

It appeared upon the trial before me, that, on the morning in question, the plaintiff went to one of the polling booths to make certain inquiries of the presiding officer. The polling booth was one of several stations placed in different parts of a school, and was called Booth No. 2. While the plaintiff was inquiring for the presiding officer, the returning officer came into the booth No. 2, and inquired if he was a voter. A conversation then took place, the details of which are unimportant, inasmuch as it was admitted upon the argument that in substance it amounted to a claim on the part of the plaintiff of the right to remain in the booth at his

(1) The learned judge had resigned at the end of Hilary Term.

discretion,—such claim being founded upon the concluding words of the 51st clause of the schedule to the above Act; and a claim on the part of the returning officer, founded upon clause 21 of the schedule, of a right to exclude him from the booth, in the absence of any claim on his part to remain there for any of the purposes mentioned in the earlier part of clause 51. At the trial, I entered the verdict for the defendant, with leave to the plaintiff to move to enter a verdict with 40*s.* and certificates, if the verdict ought so to be entered.

The case entirely turns upon the proper construction to be placed upon the two clauses of the schedule, 21 and 51. Clause 21 enacts as follows:—"The returning officer shall appoint a presiding officer to preside at each station, and the officer so appointed shall keep order at his station, shall regulate the number of electors to be admitted at a time, and shall exclude *all other persons* except the clerks, the agents of the candidates, and the constables on duty." Clause 51 is as follows:—"A candidate may himself undertake the duties which any agent of his if appointed might have undertaken, or may assist his agent in the performance of such duties, *and may be present at any place at which his agent may in pursuance of this Act attend.*"

It is important to bear in mind that by clause 57 it is provided that the expression "agents of the candidates" used in relation to a polling station means agents appointed in pursuance of s. 85 of 6 & 7 Vict. c. 18. The agents appointed under s. 85 of the last-mentioned Act were agents "for the more effectual detection of the personation of voters." They were to be nominated before the time fixed for the poll; and notice of their appointment was to be given to the returning officer: and the section goes on to provide that "thereupon *it shall be lawful for every such agent to attend during the time of polling at the booth or booths for which he shall have been so appointed.*"

Though the present was the case of a municipal election, I think that the agents appointed by the candidate are "personation agents," having precisely the same duties as those appointed in the case of a parliamentary election.

In support of the plaintiff's right to recover, it was urged that the concluding words of clause 51 of the schedule give the candi-

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dates an absolute right to be present; that, looking at the earlier part of the clause, it would be unreasonable to restrict that right to cases in which their minds have been made up to undertake the duties of agents themselves, as they ought to have an opportunity of judging how their agents are performing their duties at the several stations; that, looking to the nature of the duty of *assisting* an agent, which is reserved to them by clause 51 of the schedule, it consists merely of being present and observing the voters, and it would be absurd to suppose that the legislature intended that the right of the candidate to be present should depend upon his answering the returning officer's inquiry as to whether he was there to assist his agent or not. Moreover, it was argued that, inasmuch as the candidate must necessarily be present in the station in order to discharge either of the duties expressly authorized by the earlier part of clause 51, the latter words would have been unmeaning and inoperative if only intended to give him a right to be present in those cases.

On the other hand, the strong and imperative words of clause 21 were relied upon by the defendant, and it was contended that they were sufficient to entitle the defendant to a verdict; that the latter part of clause 51 must be read as merely impowering the candidate, for the purposes mentioned in the earlier part of the clause, to be present in a place from which he in common with all others was required to be excluded by the presiding officer under the words of clause 21; that the great object of the Act was to maintain secrecy of voting, which would be pro tanto impaired by allowing the candidate to enter each polling station and remain there at his discretion, and thereby to exercise more or less moral influence over the voters, especially the illiterate portion of them; that the returning officer ought at all events to have a discretionary power of removing any persons who were not present under some express provision of the Act for purposes connected with some duty or business; and that therefore, inasmuch as the plaintiff admitted that he was there claiming a discretionary right to be there, and not professing to be in the discharge of any duty or business, the defendant had a right to order him to leave the booth, and, upon his refusal, to cause him to be removed, under s. 9 of the Act and clause 21 of the schedule.

Upon a full consideration of these arguments and of the various provisions of the Act, I have come to the conclusion that the plaintiff is entitled to have the verdict entered for him according to the leave reserved.

The words of clause 21 are undoubtedly strong and unqualified, except so far as they are modified by the exceptions contained in the clause itself; but one of those exceptions is "the agents of candidates," who by clause 57 are defined to be the personation agents appointed under s. 85 of 6 & 7 Vict. c. 18. These agents are persons whose duties under 35 & 36 Vict. c. 33, can only be discharged by means of their presence in the polling station, and by their observing there the persons who come to vote, and forming a judgment as to whether they are persons really on the register or not. Their right to be present in the booth, which was secured by the concluding words of s. 85 of 6 & 7 Vict. c. 18, is preserved by one of the exceptions in clause 21. That right I consider to have been absolute as regards the booth to which they were appointed. Then, is the right given to the candidate by clause 51 less absolute? I cannot see that it is. The words of the clause are unlimited; and it would require the insertion of other words,—such as, "for that purpose," or "for either of the purposes aforesaid,"—in order to restrict their application to the two special purposes mentioned in the earlier part of the clause. This I do not feel at liberty to do, from a mere suspicion, however strong, that it might have been the intention of the legislature that the right of the candidate should be so restricted.

It may be argued that, in order to put this construction upon clause 51, it is necessary to import the word "candidates" into the exceptive words in clause 21. Strictly speaking, this is so; but difficulties such as these unfortunately occur daily in the construction of Acts of Parliament; and the true solution of that which exists in the present case appears to me to be, that it is far more probable that the case of the candidate, and his powers, was not present to the mind of the draughtsman when he drew the exceptions in clause 21, than that he should have used such large words as those in clause 51 intending at the time that they should be restricted, as contended for by the defendant.

I think, therefore, that the very large words of clause 21 must

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be held to be qualified by the equally large words at the conclusion of clause 51, and that the candidate at an election has a right to be present in the polling booths, without being called upon to assign any reason as to the cause of his presence. This, of course, will not justify any misconduct on his part when in the station, for which he might be removed under s. 9.

I think that the rule should be made absolute.

Rule absolute.

Attorney for plaintiff: *E. Worthington, for Sale, Shipman, Seddon, & Sale.*

Attorneys for defendant: *Johnson & Weatheralls, for George Hadfield, Jun., Manchester.*

Jan. 20

HILL *v.* CAMPBELL AND WIFE.

Libel—Discovery and Inspection of Documents under 14 *&* 15 *Vict. c.* 99, *s.* 6, *and s.* 50 *of the Common Law Procedure Act*, 1854 (17 *&* 18 *Vict. c.* 125).

11 W R 5) 219
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The power of the Court to grant inspection under 14 & 15 Vict. c. 99, s. 6, is limited to cases where a bill for discovery in equity could be maintained.

The plaintiff, who had been in the domestic service of the defendants, left their service, and obtained an engagement with one H. The female defendant wrote a letter to H. which induced him to decline to take the plaintiff into his service, and H. returned the letter to the writer. The plaintiff, assuming that the letter contained libellous matter concerning him, brought an action, and, upon an affidavit that he believed the letter to be a libel, and that it was necessary for the conduct of his case that he should have inspection of it, took out a summons calling upon the defendants to shew cause why he should not be at liberty to inspect it and take a copy. Upon the hearing of the summons, it was objected on the part of the defendants that it was not competent to the judge to make the order prayed, inasmuch as it would be calling upon the defendants to produce that which might render one of them liable to a criminal prosecution. Bramwell, B., thereupon, as a condition of his refusing to make an order for inspection, required the female defendant to make an affidavit that the letter, if produced, would tend to criminate her. The defendants' counsel declining to produce such an affidavit, the order for inspection was made.

Upon a motion to rescind this order:—

Held, by Lord Coleridge, C.J., and Grove, J.,—Brett, J., dissenting,—that, inasmuch as the letter was relied on to support the plaintiff's case, and therefore, if material at all, must necessarily tend to lay the female defendant open to a criminal charge, discovery of it could not have been obtained by a bill for discovery or a motion for inspection in equity (because the bill would have been

demurrable), and consequently that the order was one which the judge had no power under either 14 & 15 Vict. c. 99, s. 6, or 17 & 18 Vict. c. 125, s. 50, to make.

Semble, per Brett, J., that, although a party cannot be compelled to criminate himself by answer to interrogatories or production of a document, it is neither unfair nor unjust to call upon him to take the objection by affirming upon oath that his answer will (or may) tend to criminate him, and therefore that the condition was one which the judge under the latter part of s. 50 of the Common Law Procedure Act, 1854, might properly in his discretion impose.

Held, by Lord Coleridge, C.J., and Grove, J.,—Brett, J., dissenting,—that s. 6 of 14 & 15 Vict. c. 99 is not altered or extended in its import by ss. 50 and 51 of the Common Law Procedure Act, 1854.

Held also, by Lord Coleridge, C.J., and Grove, J., that, although, in an application for inspection under 14 & 15 Vict. c. 99, s. 6, only, the power of the Courts of common law is limited by the practice of the Courts of equity; yet, where the application is for discovery under s. 50 of the Act of 1854, the power of the Courts of common law is not so limited.

Held, by Brett, J., that the power of the Court is not now limited, either in allowing interrogatories, discovery, or inspection of documents, by any reference to the former or present power or practice of the Courts of equity on a bill of discovery; and that therefore it is no valid objection to such an order that, if the facts relied upon by the applicant had appeared on the face of a bill for discovery in equity, the bill would have been demurrable, or that no order for inspection would have been made.

And *semble*, per Lord Coleridge, C.J., that the plaintiff in the present case might have obtained inspection of the letter in question by pursuing the course of procedure pointed out by s. 50 of the Common Law Procedure Act, 1854.

Distinction between discovery and inspection under 14 & 15 Vict. c. 99, s. 6, and 17 & 18 Vict. c. 125, s. 50, and interrogatories under s. 51 of the last-mentioned Act.

THIS was an action against husband and wife for an alleged libel contained in a letter written by the female defendant.

The circumstances under which the alleged libel was written and published were as follows:—The plaintiff had been a domestic in the service of the defendants. Having left their service, he obtained an engagement in a similar capacity with a Major Horrocks, upon a character given of him by the male defendant. After the plaintiff's engagement with his new employer, the female defendant wrote a letter to that gentleman concerning the plaintiff which induced him to decline to take the plaintiff into his service. This letter had been returned by Major Horrocks to the writer at her request.

Upon an affidavit stating these facts, and further stating that the plaintiff had reason to believe and did believe that the letter

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so written by the female defendant was a libel on him, and that it was necessary for the conduct of the plaintiff's case that he should have inspection of it, a summons was taken out before Bramwell, B., calling upon the defendants to shew cause why the plaintiff should not be at liberty to inspect and take a copy of the letter. Upon the hearing of the summons it was objected on the part of the defendants that it was not competent to the judge to make the order prayed, inasmuch as it would be calling upon the defendants to produce that which might render the female defendant liable to a criminal prosecution. The learned Baron thereupon offered to refuse to make the order, if the female defendant would make an affidavit that she feared that the letter, if produced, would tend to criminate her. The defendants' counsel declining to produce such an affidavit, the learned Baron made an order for inspection as prayed.

Lucius Kelly, in Michaelmas Term last, obtained a rule nisi to rescind that order, on the ground that the learned Baron had no power to impose such a term, because, upon the facts before him, no discovery could have been obtained in equity, and also because, the letter being alleged by the plaintiff himself to be a libel, it was not competent to the Court or a judge to put the female defendant to the alternative of producing it or incurring the risk of prejudicing the defendants' case at the trial by her refusal to make the affidavit suggested. He referred to the following authorities:— *Bartlett* v. *Lewis* (1); *Tupling* v. *Ward* (2); *M'Fadzen* v. *Corporation of Liverpool* (3); *Edmunds* v. *Greenwood* (4); *Villeboisnet* v. *Tobin* (5); *Inman* v. *Jenkins* (6); *Cartwright* v. *Green* (7); *Davis* v. *Gray* (8); Story's Equity Jurisprudence, § 599; and Kerr on Discovery, 182, ed. 1870, referring to *Honeywood* v. *Selwin* (9), per Lord Hardwicke.

Nov. 21, 1874. *Castle* shewed cause. There is a material distinction between interrogatories under s. 51 of the Common Law

(1) 12 C. B. (N.S.) 249; 31 L. J. (C.P.) 230.
(2) 6 H. & N. 749; 30 L. J. (Ex.) 222.
(3) Law Rep. 3 Ex. 279.
(4) Law Rep. 4 C. P. 70.
(5) Law Rep. 4 C. P. 184.
(6) Law Rep. 5 C. P. 738.
(7) 8 Ves. 408.
(8) 30 L. T. (N.S.) 418.
(9) 3 Atk. 276.

Procedure Act, 1854, and discovery or inspection of documents. With regard to the latter, the Courts of common law exercised an equitable jurisdiction even before 14 & 15 Vict. c. 99, s. 6. (1) *Edmunds* v. *Greenwood* (2), *Villeboisnet* v. *Tobin* (3), and *Inman* v. *Jenkins* (4), proceeded upon that distinction. The common law right of inspection is considerably enlarged by 14 & 15 Vict. c. 99, s. 6, and still further by s. 50 of the Common Law Procedure Act, 1854, and is as large as the right of discovery and inspection formerly exercised exclusively by the Court of Chancery. There, the defence that the document as to which discovery is sought would if produced tend to criminate the party called upon to produce it, must, as in the case of a witness under examination in the box, be taken by the party himself upon oath,—unless it appears on a judicial proceeding of which the Court will take cognizance.

[LORD COLERIDGE, C.J. That is scarcely consistent with *Cartwright* v. *Green* (5), where a bill was held by Lord Eldon to be demurrable on that ground.]

In *The King of the Two Sicilies* v. *Willcox* (6), Lord Cranworth compelled the production of documents notwithstanding it was alleged that their production would render the parties called upon and others liable to criminal punishment and penalties.

[LORD COLERIDGE, C.J. The Lord Chancellor distinguishes between penalties in this country and abroad. "Our maxim," he says, "is, that a person need not expose himself to penalties; but I have always considered that the maxim related to this country and not to another."]

(1) 14 & 15 Vict. c. 99, s. 6, enacts that, whenever any action or other legal proceeding shall be pending in any of the superior Courts of common law, &c., such Court or a judge may, "on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this Act a discovery might have been obtained by filing a bill or by any other proceeding in a Court of equity at the instance of the party so making application as aforesaid to the said Court or judge."

(2) Law Rep. 4 C. P. 70.

(3) Law Rep. 4 C. P. 184.

(4) Law Rep. 5 C. P. 738.

(5) 8 Ves. 408.

(6) 20 L. J. (Ch.) 417.

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In *Hill* v. *Philp* (1), an order was made, under 14 & 15 Vict. c. 99, s. 6, for the inspection of books kept by the keeper of a lunatic asylum licensed under 8 & 9 Vict. c. 100, and other documents. In *Osborn* v. *London Dock Co.* (2) it was held that the objection to interrogatories on the ground that the answers will or may tend to criminate must be taken by the party himself when he has been sworn. And see *Boyle* v. *Wiseman.* (3)

[LORD COLERIDGE, C.J. Assume that, if the question arose at the trial, the objection must be taken by the witness himself upon oath, and that interrogatories stand upon pretty much the same footing in that respect; here we are dealing with discovery, which is very different.]

In *Collins* v. *Yates* (4), the Court of Exchequer, in an action for a libel where there was a plea of justification imputing to the plaintiff dishonesty while in the employ of the defendant, allowed the plaintiff, under s. 50 of the Common Law Procedure Act, 1854, to inspect accounts furnished by himself of moneys received in the course of his employ, and of entries in the defendant's books of moneys received from him, so far as they might be material to disprove the charges contained in the plea. In *Atkinson* v. *Fosbroke* (5), which must govern this case, in an action of slander, it being shewn that the defendant, at a certain place, in the presence of certain persons, had made imputations against the plaintiff to the effect that he had committed forgery, but that the persons present refused to give the plaintiff any further particulars, the Court of Queen's Bench allowed interrogatories to be put to the defendant as to the precise words which he had used. Blackburn, J., said: "In allowing the interrogatories (6), so far from intending to interfere with the decision of the Court of Common Pleas in *Stern* v. *Sevastopulo* (7), I fully agreed with it; but I thought the circumstances were different, and precisely those under which, though in an action of slander, interrogatories ought to be allowed." At all events, in a matter where the judge at chambers has exercised his discretion, the Court will not interfere,

(1) 7 Ex. 232; 21 L. J. (Ex.) 82.
(2) 10 Ex. 698; 24 L. J. (Ex.) 140.
(3) 10 Ex. 647; 24 L. J. (Ex.) 160.
(4) 27 L. J. (Ex.) 150.
(5) Law Rep. 1 Q. B. 628.
(6) At Chambers.
(7) 14 C. B. (N.S.) 737; 32 L. J. (C.P.) 268.

(2) 8 C 1 Jur N.S. 93.
(3) 8 C 1 Jur N.S. 115.
10 Jur N.S. 317.

unless they see clearly that that discretion has been exercised erroneously: see *The Republic of Peru* v. *Weguelin.* (1)

Kelly, in support of his rule. At common law, the exercise of their equitable jurisdiction to grant inspection was confined by the Courts of common law to cases where the instrument sought to be inspected was one upon which the plaintiff charged the defendant as a party thereto, when only one part of the instrument had been executed, and the party holding it consequently held it as trustee for both, or where a counterpart had been lost, or the like. The principles of the common law as to inspection have, no doubt, been enlarged by 14 & 15 Vict. c. 99, s. 6, and by s. 50 of the Common Law Procedure Act, 1854; but not beyond the cases in which the Courts of equity were in the habit of granting discovery on bill or on motion. Equity would never grant discovery in respect of a document which would tend to criminate the party. In *Pritchett* v. *Smart* (2), this Court intimated that they would not compel a party, under their common-law jurisdiction, to produce a document the production of which might subject him to penalties; Coltman, J., saying: "It seems to me that we must reject the application, upon the same grounds on which a Court of equity would refuse to call upon the party to answer a bill of discovery." And Cresswell, J., refers to *Bullock* v. *Richardson* (3) as an authority for that position. The affidavit upon which the application for inspection is founded fixes the letter as the libel in respect of which the plaintiff is suing. The case falls precisely within the principle of *Edmunds* v. *Greenwood.* (4) The only difference between the two cases is, that there the production of the document *might* tend to criminate the party producing it, and here it *must.*

[LORD COLERIDGE, C.J. The difficulty you have to meet is s. 50 of the Common Law Procedure Act, 1854, which provides that the Court may, "upon an affidavit of the party of his belief that any document to the production of which he is entitled for the purpose of discovery *or otherwise,* is in the possession or power of the opposite party," order that such party "shall answer on affidavit stating what documents he or they has or have in his possession or power relating to the matters in dispute, &c., and

(1) Law Rep. 7 C. P. 352.
(2) 7 C. B. 625; 18 L. J. (C.P.) 211.
(3) 11 Ves. 373.
(4) Law Rep. 4 C. P. 70.

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whether he objects (and, if so, on what grounds,) to the production of such as are in his possession or power; and, upon such affidavit being made, the Court or judge may make such further order thereon *as shall be just.*" You must not assume that this is a matter of which a Court of equity would not grant discovery. The only way to get out of that is, by shewing that the document is in its own nature one which the Court can see will tend to criminate the party against whom discovery is sought.]

Res ipsa loquitur. The action will not lie unless the publication complained of is a criminal libel. In *Whateley* v. *Crowter* (1) it was held to be an objection to interrogatories under s. 51, that the answers may reasonably be expected to relate *exclusively* to the case of the interrogated party. "The object of the enactment," says Lord Campbell, "was, to obviate what was a scandal to the law, namely, the necessity of commencing a fresh suit in a Court of equity for the purpose of obtaining discovery in aid of an action at law. To effectuate this, it is enacted that, by leave of the Court or a judge, a party to a suit may deliver 'interrogatories in writing upon any matter as to which discovery may be sought.' What is the interpretation to be put upon that? I think it is too wide an interpretation to say, as seems to have been said by Alderson, B., in the case cited, in the Exchequer (2), that every question may be asked on interrogatories which might be asked if the party were a witness at the trial. I think the interrogatories must be confined to matters which might be discovered by a bill of discovery in equity."

[LORD COLERIDGE, C.J. In s. 50 the words are "to the production of which he is entitled for the purpose of discovery *or otherwise.*" By s. 51 interrogatories are to be allowed "upon any matter as to which discovery may be sought." That seems to limit the right to cases in which a Court of equity would grant discovery.

GROVE, J. In the case of *The Macgregor Laird* (3), upon a motion by the defendants for leave to inspect certain correspon-

(1) 5 E. & B. 709; 25 L. J. (Q.B.) 163.

(2) *Osborn* v. *London Dock Co.*, 10 Ex. 698, 702, where Alderson, B., said: "The proceeding is analogous to that of the examination of a witness at the trial. It seems to me that the same rules should be followed."

(3) Law Rep. 1 Ad. & Ec. 307.

dence between the plaintiff and his agent, Dr. Lushington said: "I have examined the cases at common law on this subject; but the whole question appears to me to be in a state of darkness and confusion. It would not be right for the Court to order documents to be produced of the contents of which it knows nothing. I direct that the documents in question be produced for my inspection; and I shall then consider whether I ought to grant the present application."]

In *Baker* v. *Lane* (1), in an action of libel, interrogatories pointing to the publication of the alleged libel by the defendant in a newspaper, as to which no declaration had been registered in pursuance of 6 & 7 Wm. 4, c. 76, ss. 6, 7, at the Stamp Office, were disallowed, as tending to shew that the party sought to be interrogated had committed a criminal offence. But, in *Bickford* v. *Darey* (2), it was held to be no objection to the delivery of interrogatories under s. 51, that the answers would criminate the party interrogated, provided they are put bonâ fide; but he may on that ground refuse to answer them.

Cur. adv. vult.

Jan. 20, 1875. The judges differing in opinion, the following judgments were delivered:—

BRETT, J. In this case Mr. Kelly obtained a rule to rescind an order made by Bramwell, B., at Chambers, directing the defendants to give inspection to the plaintiff of a certain letter.

The action was for libel. The facts stated to the learned judge at Chambers, and to us, as those on which the plaintiff relied, were, that he had been a domestic in the service of the defendants; that he had left their service, and had obtained another engagement, after a reference to the male defendant; that the female defendant had then written a letter to the plaintiff's new employer, who had thereupon cancelled his engagement with the plaintiff; that the plaintiff had therefore reason to believe, and did believe, that the letter so written by the female defendant was a libel; that the letter had been returned to the female defendant at her request; that the action was brought for a libel alleged to be contained in the letter; and that it was necessary for the conduct

(1) 3 H. & C. 544; 34 L. J. (Ex.) 57. 11 Jur. N.S. 117.

(2) Law Rep. 1 Ex. 354. 12 Jur. N.S. 846.

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of the plaintiff's case that he should have inspection of that letter.

Upon these facts appearing on the hearing of the summons, and upon an objection being made by counsel on the part of the defendants that the order ought not to be made, because it might oblige the female defendant by producing the letter to lay herself open to a criminal charge, Baron Bramwell offered to refuse to make an order for inspection, if the female defendant would make an affidavit that she feared that the letter would tend to criminate her. The counsel for the defendants declined on the part of his clients to produce such an affidavit; and thereupon the judge made an order for the inspection of the letter.

It was argued before us that, notwithstanding the refusal of the defendants to produce the suggested affidavit, the learned judge was wrong in making the order,—first, because upon such facts as were before him, no discovery by way of inspection could have been obtained by filing a bill of discovery in equity; for, upon such facts appearing in a bill of discovery, the bill would have been demurrable, and, if discovery could not have been obtained in equity, inspection could not be granted at common law,—secondly, if that objection could not be sustained, that the order ought not to have been made, because the letter was alleged by the plaintiff to be a libel, and a defendant ought not to be forced either to produce or to make oath concerning a letter so described by the plaintiff in the application for inspection, unless under very peculiar circumstances, which did not exist in this case.

In consequence of this order having been made at Chambers, with the usual and necessary liberty of action there practised, it is difficult, but it seems necessary, to extricate exactly what the point is which the Court is now bound to determine. It does not seem to have been a case in which the plaintiff required the defendants to make an affidavit stating what documents they had in their possession: the plaintiff affirmed and the defendants did not deny that the defendants had the letter. What the plaintiff asked for by the summons was an order for the inspection of the particular letter. The application, therefore, was not for discovery under s. 50 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), but for inspection either under the latter part of

such s. 50, or under s. 6 of 14 & 15 Vict. c. 99. It seems to me that at Chambers the application should be taken to be made under any legal power which the judge has to grant the application. The objection, therefore, taken on behalf of the defendants would seem to have been in effect that the affidavit made by the plaintiff, or the uncontradicted statement of facts equivalent to it, shewed on the face that the production asked for of the document particularized must be either wholly immaterial to support the plaintiff's case, or must tend to lay the female defendant open to a criminal charge; that, in either case, discovery of it could not have been obtained by a bill in equity, because the bill would have been demurrable; that consequently the case was not brought within either of the statutes; and that consequently the judge had no power to make the order. The objection was not nor is that the judge, having power to make an order, ought not to have imposed the terms of an affidavit to be made by the female defendant, but that the case was, upon the shewing of the plaintiff, one in which the judge had no power to make an order, because the requirements of neither statute were fulfilled.

In order to determine this question, it seems necessary to consider carefully what the present powers of the common law Courts are, both as to discovery of other matters and as to discovery and inspection of documents.

First, then, the common law Courts have a common law power to order inspection of certain documents; but they had no power at common law to order discovery. By statute 14 & 15 Vict. c. 99, s. 6, the power of ordering inspection was enlarged. It did not purport to give a power of ordering discovery; and it did not directly give any such power. But indirectly it seems to have given some such power, and in this way,—the applicant for inspection made an affidavit that certain documents were in the possession of the respondent, and stated other facts to shew that he was entitled to inspect them; the respondent might resist the order, among other modes, by answering by affidavit that no such documents were in his possession or control; if he did not make such an affidavit, it was assumed that such documents were in his possession or control: the applicant, therefore, forced him to admit or deny the possession or control of the documents specified by the

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applicant: this was indirectly forcing the respondent to a discovery. But it was an indirect and a limited power of discovery, confined to such documents as the applicant could conscientiously specify. By s. 50 of the Common Law Procedure Act, 1854, the power of the common law Courts to make an order for the discovery of documents was considerably enlarged. The power was made direct; and, if the applicant for an order to discover could specify any one or more documents of a certain kind as being in the possession or control of the respondent, the latter, if he could not avoid the proposed order altogether, must by affidavit make discovery of his possession of or control over, not only the specified document or documents, but of all relating to the matters in dispute. It is a question to be considered hereafter, whether the 50th section enlarged at all the power of making an order for the inspection of the documents discovered under the order for discovery.

The power of the common law Courts to make orders for discovery was further enlarged by s. 51 of the Common Law Procedure Act, 1854. By that section they have power to order a respondent to answer on affidavit, not only as to his possession or control of documents, but interrogatories upon other matters.

Now, in all the three enactments there is a limitation as to the subject-matter of the order. In s. 51 it is not interrogatories as to all matters which are to be allowed, but only as to "any matter as to which discovery may be sought." In s. 50, the affidavit of the applicant is not to be as to any document, but as to "any document to the production of which he is entitled for the purpose of discovery or otherwise." In s. 6 of 14 & 15 Vict. c. 99, it is not all documents which may be inspected; but only documents in cases in which previous to the passing of the Act "a discovery might have been obtained by filing a bill or by any other proceeding in equity."

Having regard to the authorities and to the question as now brought before us, it seems to me impossible to come to a satisfactory determination without carefully considering what the limitations in all these cases are, and whether they are the same in all, and whether, reading them all as applicable to the powers of the Court, the limitation in 14 & 15 Vict. c. 99, s. 6, as to the

kind of document of which inspection may be ordered is not enlarged. One view is, that the limitation in all the enactments refers to and is co-extensive with the limitation of the power of the Courts of equity to grant discovery, or discovery by means of inspection or a bill of discovery. As to the extent of the limitation in s. 6 of 14 & 15 Vict. c. 99, the Court of Common Pleas, in *Gomm* v. *Parrott* (1), refused to make an order for inspection, because "no bill for a discovery (i.e. no bill of discovery in equity) could have been maintained in this case before the Common Law Procedure Act, 1854; consequently we think that this rule must be discharged." That measures the limitation in the statute 14 & 15 Vict. c. 99, at the time it was passed, by the limitation of the powers of a Court of equity on a bill of discovery. It must be noticed that the order is said in the head-note to have been applied for under s. 6 of 14 & 15 Vict. c. 99, and that the judgment refers to s. 50 of the Common Law Procedure Act, 1854. It is probable that the application for an order to inspect was taken to be made under either or both. The interpretation may therefore be taken to apply to either or to both. If it applies only to s. 6 of 14 & 15 Vict. c. 99, the question still arises whether the limitation as to the kind of document is not enlarged by s. 50 of the Common Law Procedure Act, 1854. If it applies to both, there is a question whether the case itself is not overruled or departed from in subsequent judgments.

In *Hunt* v. *Hewitt* (2), the Court, in an elaborate judgment, explained the construction of s. 6 of 14 & 15 Vict. c. 99,— "Further," they say, "the affidavit (i.e. of the applicant) must shew that the applicant would by a bill of discovery or other proceeding be able to obtain a discovery and inspection of the documents. Under the last head, we must follow the rules established in Courts of equity within which every plaintiff must bring himself in order to obtain an inspection by bill of discovery; and therefore, if the facts be disputed, the affidavit ought to state all that a plaintiff in equity must state in order to entitle himself to a discovery and inspection." The judgment goes on to say (3); "To this affidavit the opponent may answer by swearing that he

(1) 3 C.B. (N.S.) 47; 26 L. J. (C.P.) 279.

(2) 7 Ex. 236; 21 L. J. (Ex.) 210.

(3) 7 Ex. at p. 244.

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has no such documents, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them." This is an authoritative and a clear decision that the limitation in the statute 14 & 15 Vict. c. 99, is, that the facts must be such as would obtain both discovery of the documents and inspection of them in equity.

These are the cases which interpret judicially the statute 14 & 15 Vict. c. 99. We must now turn to those which interpret the Common Law Procedure Act, 1854. They mostly deal with s. 51, but must be considered.

In *Osborn* v. *London Dock Co.* (1), an objection taken to a proposed order for interrogatories under s. 51 was, that, if the respondent was a party to such fraudulent practices as those sought to be established by the answers to the interrogatories, the respondent would be liable to be indicted for the same. And it was argued that the right to the delivery of interrogatories under the 51st section is confined to cases where a discovery might have been obtained in a Court of equity, and that a bill of discovery could not be obtained in a case where the questions sought to be put would criminate the party sought to be interrogated. In answer to this argument, Parke, B., said (2): "The language of the 51st section is much more extensive in its signification, *and has no such limitation as that contended for.*" He then allocates and joins together ss. 50 and 51, and then says of s. 51, "It does not say that the power is limited to cases in which a bill of discovery will lie." And Alderson, B., says (3): "The proceeding is analogous to that of the examination of a witness at the trial. It seems to me that the same rules should be followed. The system introduced by this statute is an improvement upon the method of proceeding by bill of discovery." These are strong intimations that the limitation in s. 51, and perhaps in s. 50 also, is not conterminous with the power of Courts of equity on bills of discovery. But, in *Whateley* v. *Crowter* (4), Lord Campbell says: "I think the interrogatories must be confined to matters which might be discovered by a bill of discovery in equity." Erle, J., assented. The point, however,

(1) 10 Ex. 698; 24 L. J. (Ex.) 140. 1 Jur. N.S. 94
(2) 10 Ex. at p. 702. 1 Jur. N.S. 95
(3) At p. 702. 1 Jur. N.S. 95
(4) 5 E. & B. 709; 25 L. J. (Q.B.) 163. 2 Jur. N.S. 209

under discussion was whether the interrogatories must not be confined to matters which would promote the applicant's case.

In *Bartlett* v. *Lewis* (1), the objection to an order for interrogatories under s. 51 was, that the answers would tend to criminate the party. Erle, C.J., says (2): "Nor do I infer from the language of the 51st section that it was intended that the practice of the Courts of equity was to regulate us. I think the legislature has cautiously abstained from limiting the power of administering interrogatories to cases where a bill for discovery will lie." And Willes, J., says (3): "It is only necessary to look at the frame of the 51st section to see that it was intended that this new jurisdiction should be administered in the Courts of law by analogy to their own proceedings, and not to the practice of the Courts of equity. The framers of the Act evidently did not intend that we should be fettered by the rules of equity. Upon a careful consideration of its language, I think the 51st section will be found expressly to exclude the difficulties which, as appears from the treatises on the Law of Discovery by Sir James Wigram and Mr. Hare, so frequently arose in Courts of equity, as to whether an objection of this nature should be made on demurrer or come by way of answer." He goes on to say: "The party interrogated is, by the very terms of the section, placed in the position of a witness:" and he pronounces, in consequence, that the interrogatories may be put, and that the respondent must raise his objection in his answer upon oath.

Nothing can be more distinct than this is, that, in s. 51, the words, "as to which discovery may be sought," do not mean "as to which discovery would be granted in equity." And, if those words in s. 51 do not import that the limitation is to such discovery as would be granted in equity, it seems impossible to hold that the words in s. 50, "to the production of which he is entitled for the purpose of discovery *or otherwise*," mean, "as to which production would be granted in equity." The first may be read "as to which he would be entitled to discovery," when it is the same as the second; or the second may be read "as to which discovery

(1) 12 C. B. (N.S.) 249; 31 L. J. (C.P.) 230.

(2) 12 C. B. (N.S.) at p. 261.

(3) 12 C. B. (N.S.) at p. 262.

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by inspection may be sought," when it is the same as the first. The two phrases are in effect the same.

If this be true, the power of discovery of documents given by s. 50 of the Common Law Procedure Act, 1854, applies to other documents than those which could have been relied on in an affidavit under s. 6 of 14 & 15 Vict. c. 99. And, inasmuch as the power of discovery given in s. 50 is given, as it seems to me, solely for the purpose of obtaining discovery of documents which *may be* ordered to be produced for inspection, it seems to follow, unless the extended power of discovery is to be nugatory, that the power of ordering inspection applies, since the passing of the Common Law Procedure Act, 1854, to other documents than those which could have been relied on in an affidavit under 14 & 15 Vict. c. 99. It further follows that neither the order for discovery of documents nor the order for inspection is confined by the statute to such documents as could be discovered and inspected by virtue of orders or decrees made on a bill of discovery in equity. And thus, in *Daniel* v. *Bond* (1), Erle, C.J., says: "The statute has given to the Courts extremely wide powers for directing documents to be produced, *limited only by what they shall think just.*" Either, therefore, as was suggested in *The Republic of Peru* v. *Weguelin* (2), an order for inspection can be made under s. 50 of the Common Law Procedure Act, 1854, in respect of documents which could not have been ordered to be inspected under s. 6 of 14 & 15 Vict. c. 99, or, reading together the two statutes, which are in pari materie, an order for inspection made under s. 6 of 14 & 15 Vict. c. 99, can now be applied to documents discovered by means of an order for discovery of documents made under s. 50 of the Common Law Procedure Act, 1854, that is to say, to documents not necessarily limited to such as might have been discovered and inspected in equity upon a bill of discovery.

In the result, the legislation as to discovery at common law seems to me to stand thus,—that the Court may order to be administered to an opposite party any interrogatories on any matters which primâ facie are material, and in support of the applicant's case, and *which are in the opinion of the Court fair and just:* and

(1) 9 C. B. (N.S.) 716. (2) Law Rep. 7 C. P. 352.

so they may order discovery and inspection of any documents which are primâ facie shewn to be material and in support of the applicant's case, and as to which it is, in the opinion of the Court, *primâ facie shewn that it would be fair and just to order discovery and inspection.* The respondent may defend himself from answering any of the proposed interrogatories, or from producing for inspection any of the proposed documents, by satisfying upon oath the Court that he is privileged from answering the question or producing the document. The power of the Court is not now limited, either in ordering interrogatories, discovery of documents, or inspection of documents, by any reference to the former or present power or practice of Courts of equity on a bill of discovery. It is therefore no valid objection to an order for interrogatories, or to an order for discovery of documents, or to an order for inspection of documents, to shew that, if the facts relied upon by the applicant had appeared on the face of a bill of discovery in equity, the bill would have been demurrable, and the interrogatories accompanying it would have therefore fallen, or that no motion for an order for inspection could have been made.

If, in the present case, it had been necessary for the plaintiff to proceed by the bill of discovery or affidavit and motion for inspection in equity, he must on the face of the bill or affidavit have stated the existence of an action of libel at common law, that the plaintiff and defendant in equity were parties to it, that the facts existed which were stated to Baron Bramwell on the summons before him, that the letter alleged to contain the libel sued on was in possession of the defendant in equity, that it was material and necessary in support of the plaintiff's case, and that he desired discovery and inspection of it. The bill would have been accompanied by interrogatories tending to the discovery of the letter. It would be obvious on the face of the bill or of the affidavit, that, if the defendant in equity produced the letter for inspection, it must, if it contained no libel, be immaterial as in support of the plaintiff's case, leaving him in fact without any case, or it must lay the defendant in equity open to a criminal indictment for libel. Such a bill would undoubtedly be demurrable, or such motion be at once refused for the insufficiency of the affidavit. It is clear, therefore, that the Court in the present case determines that the

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objection to Baron Bramwell's order, which was put upon the ground that the facts before him would have made a bill for discovery demurrable, fails, notwithstanding the Court agrees that the facts stated before him would have made a bill of discovery demurrable.

The next question is whether the Court can say that the order, under the circumstances, was not judicially fair and just. Here, again, it seems to me, reading ss. 50 and 51 of the Common Law Procedure Act, 1854, together with s. 6 of 14 & 15 Vict. c. 99, as forming the present legislation with regard to the powers of common law Courts to enforce discovery, that what is or is not fair and just as to discovery by interrogatories is or is not fair and just in precisely the same way and to the same extent as to discovery by inspection. The question, then, is, whether it is judicially fair and just in a civil suit to order a respondent to answer interrogatories the answers to which may lay him open to a criminal charge, or to order him to discover or produce documents which would lay him open to a criminal charge, unless he will upon oath declare, and by means of facts stated upon oath satisfy the Court, that his answer or the document will lay him open, or tend to lay him open, to a criminal charge. The question is not whether he can be compelled finally to criminate himself by answer or document. Upon that point there is no doubt. He cannot by the law of England be so compelled. But the question is, whether, in either process of discovery, it is unfair and unjust to call upon him to take the objection in his answer on oath to the interrogatories put to him or the affidavit produced against him.

In *Tupling* v. *Ward* (1), a rule had been obtained calling on the defendant in an action of libel to shew cause why the plaintiff should not be at liberty to exhibit interrogatories. The objection taken was that the questions proposed were such as, if answered in the affirmative, the answers would expose the defendant to a criminal prosecution. The Court refused to allow the interrogatories to be put. "Without laying down any general rule on the subject," says Martin, B., "we think that, in cases of this kind, it *would be unfair* to submit questions which a party is clearly not bound to answer."

(1) 6 H. & N. 749; 30 L. J. (Ex.) 222.

In *Stern* v. *Sevastopulo* (1), the Court refused to allow interrogatories to be put in an action of slander, on the ground that the allowance of them in that case would not conduce to the furtherance of justice. "But the legislature," says Erle, C.J., "has been careful to draw our attention to the fact that interrogatories are not to be granted in every case. The Court *must convince itself that the step* will conduce to the furtherance of justice and the promotion of truth." "I do not mean to say that in no case will the Court allow interrogatories in an action of slander."

In *Osborn* v. *London Dock Co.* (2), interrogatories were allowed to be put, although the answers, if in the affirmative, might tend to criminate the respondent. "The plaintiff," says Parke, B., "must be put on his oath, and, when he finds any question pinch him, he must object to it." "The proceeding," says Alderson, B., "is analogous to that of the examination of a witness at the trial. It seems to me that the same rules should be followed."

In *Bartlett* v. *Lewis* (3), interrogatories were allowed to be put, although the answers might tend to criminate. "It is clear," says Erle, C.J., "that every one of the questions might be put to the party, if he were in the witness-box; and, if he then chooses to swear that his answers will render him liable to be criminally proceeded against, he may protect himself from the dilemma by declining to answer. But, independently of that privilege, *the interests of truth and justice must be allowed to prevail.* I know of no principle of law which should protect a man who has been guilty of an indictable offence from being placed in this predicament (i.e. of being obliged to take the objection in answer on oath), any more than one whose fraud and dishonesty fall short of rendering him criminally responsible." "Upon this ground," says Willes, J., "it appears to me that, even admitting that the interrogatories are put for the purpose of extracting answers which may criminate the party, or of prejudicing him in the estimation of the jury if he declines to answer them, they ought to be allowed to be put."

(1) 14 C. B. (N.S.) 737; 32 L. J. (C.P.) 268. 10 Jur. N.S. 317.

(2) 10 Ex. 698; 24 L. J. (Ex.) 140. 1 Jur. N.S. 95.

(3) 12 C. B. (N.S.) 249; 31 L. J. (C.P.) 230.

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In *Atkinson* v. *Fosbroke* (1), interrogatories were allowed to be put to a defendant as to the precise words he had used in uttering an alleged slander for which the action was brought against him. "In allowing the interrogatories," says Blackburn, J., "so far from intending to interfere with the decision in *Stern* v. *Sevastopulo* (2), I fully agreed with it; but I thought the circumstances were different." The circumstances in the case before the Court of Queen's Bench were, that something which had been stated by the defendant had been acted upon by a club committee as if the statement contained an imputation against the plaintiff, and the plaintiff could procure no evidence of what the words were which the defendant had used. Blackburn, J., agreed with the decision in *Stern* v. *Sevastopulo* (2), which was, that the allowance or disallowance of the putting of interrogatories does not depend upon whether the answers may or may not criminate the respondent, but upon whether other circumstances make it fair and just, or, in other words, in furtherance of truth and justice, that they should be put. In the case before him, he thought that under the circumstances it was fair and just to put them.

In *M'Fadzen* v. *The Mayor and Corporation of Liverpool* (3), interrogatories were allowed to be put which might lay the respondent open to indictment. "I think," says Channell, B., "that the principle suggested is *the fair and right one*, and is the principle to be gathered from the recent cases. It was not intended by the legislature that the interrogating party should be shut out from putting any question that is really material to his case. If he goes beyond that, and the Court sees that his questions are put malâ fide, or with a vexatious or improper purpose, it will not allow them. But if that is not the case, then the interrogated party should be bound to say upon his oath that he believes his answer will be evidence against him in such a way that he is protected from answering."

This brings us to the more recent cases. In *Edmunds* v. *Greenwood* (4), Martin, B., at Chambers refused to allow interrogatories to be administered to the defendant in an action of libel, the

(1) Law Rep. 1 Q. B. 628.

(2) 14 C. B. (N.S.) 737; 32 L. J. (C.P.) 268.

(3) Law Rep. 3 Ex. 279.

(4) Law Rep. 4 C. P. 70.

express object of the plaintiff being to make the defendant criminate himself if he answered them in the affirmative. Martin, B., was evidently of opinion that it was not fair and just under the circumstances to allow the interrogatories to be put. "In all the cases which have arisen upon this subject," says Bovill, C.J., "it has been considered that it is for the judge at chambers to *exercise his discretion, regard being had to the circumstances of each particular case and the nature of the proposed interrogatories;* and the Court will not interfere, unless satisfied that that discretion has been exercised improperly."

In *Villeboisnet* v. *Tobin* (1), Martin, B., had refused to allow interrogatories to be put, the answers to which might criminate. "As far as I can see," says Montague Smith, J., "the only intelligible rule is, that, when the interrogatories are bonâ fide put for the purpose of discovery, and are relevant to the matter in issue, they may be allowed, although the answers to them may tend to criminate the party answering, if answered in one way, leaving to such party the option of refusing to answer on that ground. But, where such interrogatories are sought to be put, the Court and the judge at chambers will require a stronger case to be made out for allowing them than is requisite in ordinary cases, and such interrogatories will not be allowed on the common affidavit only, but some special circumstances must be laid before the judge by affidavit or otherwise to induce him to order them. As my Brother Keating has said, no hard and fast line can be laid down; and *it must be left to the discretion of the judge in each individual case to determine whether the special circumstances are or are not sufficient for allowing such interrogatories.*" The Court refused to interfere with the decision at chambers.

In *Inman* v. *Jenkins* (2), in an action for libel, Blackburn, J., allowed interrogatories to be put to the defendant tending to shew that he had published the alleged libel. The Court refused to interfere with the exercise of his discretion. They re-affirmed the rule above laid down by Montague Smith, J.

It seems, then, that the mere fact of the interrogatories being such that an answer to them may, or even primâ facie inevitably must, lay the respondent open to a criminal charge, does not make

(1) Law Rep. 4 C. P. 184. (2) Law Rep. 5 C. P. 738.

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it *unfair and unjust* to allow them to be put, leaving the respondent to take objection to answering them by affirming on oath that he believes his answer will tend to criminate him. Although, from the nature of the interrogatories, such may or must primâ facie be the effect of the answers, other circumstances may make it fair and just to allow such interrogatories to be put. The Court or judge who is asked to allow such interrogatories to be put must exercise a judicial discretion as to whether those other circumstances do or do not make it *fair and just* in the particular case to allow such interrogatories to be put. The Court will not overrule such discretion of a judge exercised at chambers, unless it is manifest that such discretion was exercised wrongly, i.e. so as to be unfair and unjust.

This, according to the authorities, is in my opinion the decided law as to discovery of matters by interrogatories. And it further seems to me that, if such be the law as to discovery of other matters by interrogatories, it is and must equally be the law as to discovery of documents by interrogatories and as to discovery by inspection of documents.

The question, therefore, finally, as it seems to me, is this, whether the Court can say that the decision of Bramwell, B., ordering inspection in this case, unless the female defendant would affirm on oath that she believed that the letter, if produced, would tend to criminate her, was manifestly erroneous, as being manifestly unfair and unjust. I cannot say so. The letter has been acted upon primâ facie as if it contained matter defamatory of the plaintiff. The letter is in the possession of the defendants. The plaintiff cannot obtain evidence of its contents otherwise than by the inspection claimed. Similar facts were not thought to make an order unfair and unjust in *Atkinson* v. *Fosbroke* (1); and I cannot say that the present order was erroneous. The rule, therefore, in my opinion, should be discharged, with costs.

GROVE, J. I agree with so much of the judgment of the Lord Chief Justice as decides that, this being an application for inspection under 14 & 15 Vict. c. 99, s. 6, the power of the Court or judge being by such section limited to cases in which previous

(1) Law Rep. 1 Q. B. 628.

to the passing of that Act discovery might have been obtained by filing a bill or other proceeding in a Court of equity, this case does not come within that statute.

I also agree with the Lord Chief Justice that s. 6 of 14 & 15 Vict. c. 99 is not altered or extended in its import by ss. 50 and 51 of the Common Law Procedure Act, 1854. Agreeing as to this,—which is the main purport of my Lord's judgment, and all that is necessary to decide this case,—I abstain at present from giving any opinion as to the other points discussed in that judgment.

LORD COLERIDGE, C.J. In this case I have the misfortune to differ from the conclusion at which my Brother Brett has arrived. It is a real misfortune, because I do not at all doubt that I am expressing an opinion in favour of a purely technical and useless objection, and I am of opinion that, by a somewhat different mode of procedure, the plaintiff might have obtained the end which he desires, and to which in reason and justice I think, if he proceeds properly, he is entitled. I will state, because in my opinion everything depends upon it, the exact facts upon which my judgment is founded.

The rule in this case was granted on a motion made by Mr. Lucius Kelly to rescind an order made by Baron Bramwell at chambers, directing the defendants to allow the plaintiff to inspect and take a copy of a letter alleged to have been written by the female defendant. The action was one of libel. The plaintiff had been in the defendants' service, had left it, and had obtained a new engagement after and upon a letter written by Mr. Campbell. Mrs. Campbell wrote a letter to the new master of the plaintiff, who thereupon, and, as the telegram before us intimates distinctly, in consequence of the letter, cancelled the engagement, and returned the letter to Mrs. Campbell, at her request, after proceedings had been threatened. The alleged libel was contained in this letter: and the plaintiff, being unable to declare without an inspection of it, made the ordinary affidavit to entitle him to inspection. On the application before Baron Bramwell, "the counsel for the defendants," to use the language of the affidavit of the plaintiff's attorney, "suggested that the defendants ought not

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to be compelled to produce the letter for inspection, as it might tend to criminate the female defendant. But the learned Baron refused to permit that question to be discussed, unless as a preliminary step an affidavit to that effect were made by the female defendant." He offered to adjourn and did adjourn the summons for that purpose. But the female defendant was advised not to make such an affidavit: that fact was communicated to the attorney for the plaintiff; and afterwards the order appealed from was made by the learned Baron.

It appears to me, therefore (and I do not gather from the elaborate judgment of my Brother Brett that it appears differently to him), that this was an application under 14 & 15 Vict. c. 99, s. 6, to my Brother Bramwell, and that we must decide it upon that statute. No doubt, the language of this statute may have been explained or extended by the language of later ones, such as the Common Law Procedure Act, 1854, ss. 50 and 51: but at last it is on this statute, altered, if it be so, by those, that the judgment must turn.

Now, it is clear, I should have said from the words themselves, certainly from the words as expounded by the authorities, that the words "to the production of which he is entitled for discovery or otherwise," in the 50th section of the Common Law Procedure Act, 1854, and the words in the 51st section of the same Act, "upon any matter as to which discovery may be sought," are in effect the same. It is, I think, also abundantly clear, both from the words and upon the authorities, that, in an application for discovery made in the manner pointed out in the 50th section, the power of the Courts of common law is not to be limited by the practice of the Courts of equity. I think it also abundantly clear, both from the words and upon the authorities, that, in an application for inspection under 14 & 15 Vict. c. 99, s. 6, *only*, the power of the Courts of common law would be and is limited by the practice of the Courts of equity. But I am unable to persuade myself that, where the procedure of the earlier Act has been followed which is to result in a certain consequence, another consequence, which is to follow upon a certain other procedure enacted in the later Act, and which has *not* been followed, is to result. It would be, I think, to make statutes, and not expound them, if we were thus to hold.

The history of the legislation on this subject has been quite accurately stated by my Brother Brett. In short it is this:—The 14 & 15 Vict. c. 99, s. 6, gave the Courts of common law power to order inspection in certain cases, limiting those cases by the practice of the Courts of equity. But, between the date of that statute and the Common Law Procedure Act, 1854, there was wanting the power of discovery to aid that of inspection. The Common Law Procedure Act, 1854, s. 50, gave that power, and also gave an additional power to the Court, viz. upon the affidavit of the party, whether plaintiff or defendant, answering the order for discovery, to make such further order thereon, i.e. on the affidavit, as should be just. The 51st section deals with the subject of interrogatories, and, as it seems to me, it and the cases decided upon it have nothing to do with a case in which there are no interrogatories, and in which no question as to them or the answers to them has arisen.

It has been usual since the enactment of the 50th section to follow the order of procedure therein enacted; and, as I have already stated, I make no question that, where the order for inspection follows the affidavit of the defendant answering the order for discovery, the power of the Court is not limited by the practice of the Courts of equity. It is on this point that the cases cited and examined so ably and elaborately by my Brother Brett have been decided. In all of them, as far as I can ascertain by the reports, excepting *Gomm* v. *Parrott* (1) and *Hunt* v. *Hewitt* (2), the procedure pointed out by the 50th section of the Common Law Procedure Act, 1854, was followed, and the endeavour was to limit the later statute by the earlier one, and to contend that, as the word "discovery" was used in the later statute, the apparently larger powers given by the later statute must be confined to the lesser powers given by the earlier one. Against this the Courts most properly, if I may say so, set their face; and, in spite of occasional expressions, of which the one quoted by my Brother Brett from the judgment of Lord Campbell in *Whateley* v. *Crowter* (3) is an example, a series of cases has decided that, when the

(1) 3 C. B. (N.S.) 47; 26 L. J. (C.P.) 279. 3 Jur. N.S. 1150

(2) 7 Ex. 236; 21 L. J. (Ex.) 210.

(3) 5 E. & B. 709; 25 L. J. (Q.B.) 163. 2 Jur. N.S. 207.

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question arises under the Common Law Procedure Act, 1854, the power and the discretion of the Courts is greater and wider than that intrusted to them under 14 & 15 Vict. c. 99.

I need not say that I have neither the desire nor the intention to question either the soundness or the authority of these cases. But the present case is very different. In this case, the procedure pointed out by the 50th section of the Common Law Procedure Act, 1854, has not been followed. There has been no affidavit ordered or made. It is by the express words of the statute *only* upon such affidavit being made, and *thereon*, i.e. on such affidavit when it is made, that "such further order as shall be just" is to be made. If the order of my Brother Bramwell is to be treated as "such further order," I must observe that it is an order made in pursuance of a statutory power, and that the condition precedent to the exercise of the power enacted by the statute does not here exist: and I do not think it tends to certainty or convenience to enact by judicial decision other or equivalent provisions which, whether they might or might not have been wisely enacted by parliament, have not been enacted in point of fact.

I must regard this as an application under 14 & 15 Vict. c. 99, s. 6; and it seems to me that the cases of *Gomm* v. *Parrott* (1) and *Hunt* v. *Hewitt* (2) are clearly and directly in point. They were both decided after 1854, and they both decide, as I understand them, that, where the procedure is under 14 & 15 Vict. c. 99, the question still is whether under the circumstances a Court of equity would grant discovery, and according to whether a Court of equity would or would not grant discovery a Court of law will or will not order inspection under that section.

The contention here on the part of the plaintiff is exactly the converse of that which the Courts have held untenable in the series of cases cited by my Brother Brett. In those it was sought to attach to the later procedure the limited consequences of the earlier statute: here, it is sought to enlarge the limited consequences of the earlier statute by the larger ones attached to a later procedure which has not been followed. Both contentions

(1) 3 C. B. (N.S.) 47; 26 L. J. (C.P.) 279.
(2) 7 Ex. 236; 21 L. J. (Ex.) 236.

appear to me to be unsound; and I conceive myself to be acting in accordance with the principle of the decided cases in so holding.

If, then, which remains to be considered, a Court of equity would not have granted discovery supposing the plaintiff to have filed a bill for it in this case, I think that my Brother Bramwell had no power to make this order, and that it must be rescinded.

Now, it seems that such a bill would have been demurrable in equity, on the ground that the action was for libel, and that the remedy of the plaintiff was or at least might have been by indictment. As a general rule, there is no doubt that a bill shewing on the face of it that the discovery will subject the defendant to criminal proceedings can be demurred to; and it is clear that, if the plaintiff here had actually indicted the defendant, a bill of discovery of the alleged libellous letter would have been dismissed. It is, indeed, laid down by Mr. Hare, in his book on Discovery, p. 116, that "it is no objection to a bill for discovery that the matter in question might have been the subject of an indictment or information;" and this passage was cited with approbation by Mr. Justice Willes in *Bartlett* v. *Lewis.* (1) But Mr. Justice Story, noticing this position of Mr. Hare, lays it down with equal clearness that a Court of equity will not grant discovery where in a civil action the facts disclosed might subject the party discharging them to penal consequences: Story on Equity Jurisprudence, § 1494, and the note thereto. And he says that the case cited by Mr. Hare in support of his position,—*Macaulay* v. *Shackell,* in the House of Lords (2),—does not support the proposition for which it is cited by Mr. Hare. Nor does it. On the contrary, Sir John Leach in *Thorpe* v. *Macaulay* (3), Lord Langdale in *Glynn* v. *Houstown* (4), and Lord Eldon in *Cartwright* v. *Green* (5),—the case on which Mr. Kelly placed great reliance in arguing this rule,—all lay down the law, as far as the personal discovery by the defendant himself is concerned, in terms which warrant Mr. Kelly's objection. In *Macaulay* v. *Shackell* (2), as in *Thorpe* v. *Macaulay* (3), a commission to examine witnesses had been asked for by the prayer of the bill, as well as personal discovery by the defendant; and in each of those cases Sir John Leach and Lord Eldon, and the House of

(1) 12 C. B. (N.S.), at p. 263.
(2) 1 Bligh (N.S.), 96.
(3) 5 Madd. 218, 229.
(4) 1 Keen, 329.
(5) 8 Ves. 408.

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Lords affirming Lord Eldon, held that a Court of equity *would* assist the proof of the truth of a libel by a commission for the examination of witnesses, for which in those times it was usual to have recourse to a Court of equity. The observations of Lord Eldon and Sir John Leach, which appear to be in favour of Mr. Hare's proposition, will, if their judgments be looked at carefully, be found to have reference to that portion of the bills in those two suits respectively which asked for a commission, and as to which portions both those judges decided in favour of the plaintiff. There is, however, no case, as far as I have been able to ascertain, in which a defendant in equity has ever been himself compelled to answer as to matters which might expose him to an indictment for libel: and the cases I have cited are strong authorities to shew that a Court of equity would not compel him. I think, therefore, it must be taken, in spite of some expressions both of judges and text-writers apparently to the contrary, that, if the power of Baron Bramwell was limited by the practice of the Courts of equity, he could not compel the female defendant to discover this letter. I have already said that I think it was so limited; and I am therefore of opinion that this rule must be made absolute.

I have also said that I am giving effect to a useless and technical objection; for, speaking for myself, I am clearly of opinion that, if the procedure of the 50th section of the Common Law Procedure Act, 1854, is now followed, the plaintiff ought to obtain inspection of that which I feel bound in the present state of things to say I think he cannot: and I entirely concur in what my Brother Brett has written on that point. But, where statutes seem clear, I will not, unless I am bound by authority, confuse them by ingenious and subtle constructions. There are two statutes with different procedures and different results. Both are in force; and cases may arise under each. Each is to be construed with reference to, no doubt, but yet independently of, the other. This case appears to me to be a case under the first statute; and I am therefore of opinion that the learned Baron exceeded his power, and that his order must be rescinded.

Rule absolute.

Attorney for plaintiff: *Alfred Hendricks.*
Attorney for defendant: *F. Taylor.*

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Construction of Manchester Improvement Act, 30 *Vict. c. xxxvi, s.* 38—*Dangerous Buildings—Conclusiveness of Certificate of City Surveyor—Ratification by Corporation of Acts of its Officers—Sufficiency of Notice.*

The 38th section of the Manchester Improvement Act, 30 Vict. c. xxxvi, enacts that, "if the surveyor of the city, or, in his absence, any other duly qualified surveyor, shall certify in writing that there is imminent danger from any building, the corporation shall and may, without any presentment, notice, or other formality, cause the same to be taken down either wholly or in part, or to be repaired or secured in such manner as the corporation shall think requisite;" and by s. 39 the expenses incurred are recoverable from the owner.

The city surveyor having certified that there was imminent danger from a building of which the plaintiff was the owner and occupier, the town-clerk, assuming to act on behalf of the corporation, issued a direction to the surveyor "to cause the building mentioned in his certificate to be taken down or repaired in such manner as he should think requisite." The surveyor thereupon employed a builder to take down and rebuild certain parts of the building, who was paid by the corporation for so doing: and the corporation afterwards recovered the amount from the plaintiff:—

Held, that the certificate of the surveyor was conclusive, and could not be questioned in an action to recover back the money so paid.

Held, also, that the acts of the surveyor, authenticated by the town-clerk, were the acts of the corporation; or that, at all events, they were ratified and adopted by them so as to justify what was done under the certificate.

The certificate and notice referred generally to the "building," No. 95, Market Street: the premises dealt with consisted, besides No. 95, Market Street, of other premises adjoining thereto, being No. 2, Palace Street, for which the plaintiff was separately rated, but connected therewith by internal communications, and occupied therewith by him as one set of business premises:—

Held, that the description in the certificate and notice was sufficient to cover both sets of premises.

THIS was an action brought to recover damages for injury alleged by the plaintiff to have been caused to his possessory and reversionary interest in certain houses and shops, with their fixtures, being Nos. 95, 97, and 99, Market Street, Manchester, and to his stock-in-trade and furniture in No. 95, by acts done by the defendants in alleged execution of powers given to them by two Acts of Parliament of 7 & 8 Vict. c. xl, intituled "An Act for the good government and police regulation of the borough of Manchester," and called hereafter "The Manchester Police Act, 1844," and by "The Manchester Corporation Waterworks and Improvement Act, 1867," 30 Vict. c. xxxvi.

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The pleadings and particulars were appended to the case. The latter contained, amongst other things, a claim for damage to "books, papers, envelopes, stationery, and other goods, machinery, and utensils damaged or lost," as being goods belonging to the plaintiff's trade and business in the house and shop No. 95, and also for fixtures in a room called "the ruling room," and in a cellar called "the ink-cellar," and also for building materials destroyed, in No. 95.

The cause came on for trial before Willes, J., at the Summer Assizes at Manchester in 1872, when a verdict was taken by consent for the damages in the declaration, subject to a case to be stated by an arbitrator, who was to assess the damages before or after the decision of the Court. The case stated was substantially as follows:—

1. The plaintiff is a wholesale stationer, and, before and at the times of the acts of the defendants hereinafter mentioned in regard to them respectively, was possessed of three houses and shops situate together in a block in Market Street, Manchester, being respectively Nos. 95, 97, and 99, Market Street. He occupied No. 95 for the purposes of his business, and had thereon at the times aforesaid a stock of stationery and other goods. He occupied also certain parts of Nos. 97 and 99. He had previously let the ground-floors of Nos. 97 and 99 respectively to tenants as shops; and at the times of the acts of the defendants hereafter mentioned in regard to Nos. 97 and 99, the tenants occupied these shops together with the parts of Nos. 97 and 99 not occupied by the plaintiff.

2. The defendants are the mayor, &c., of Manchester; and they possess certain powers for the government and regulation of that city under the two Acts above referred to. The following are the sections of these Acts chiefly relied on by the plaintiff and defendants respectively:—

Sect. 1 of the Manchester Police Act, 1844, enacts that the mayor, aldermen, and burgesses of the council of the borough shall be and they are hereby impowered to carry the Act and the several powers thereof into execution.

Sect. 2 enacts that, "for the more conveniently carrying this Act and the several powers thereof into execution, it shall be lawful for the council and they are hereby impowered to appoint out of their body from time to time one or more committee or committees, consisting of such number of persons as they

may think fit, to manage and transact all or any of the matters or purposes which they the council are hereby directed or authorized to do, execute, or perform, which committee or committees shall have such or so many of the powers and authorities and discretion by this Act given to and reposed in the council as the council shall think fit or proper to delegate to such committee or committees."

Sect. 13. "That every summons, demand, or notice, or other such document under this Act, may be in writing or print, or partly in writing and partly in print; and, if the same be required to be given or authenticated by the mayor, aldermen, and burgesses, or by the council, the signature thereof by the town-clerk shall be a sufficient signature or authentication."

Sect. 58. "And whereas it frequently happens that houses and other buildings and walls are, either from litigated titles thereto, or the obstinacy, neglect, or poverty of the owners thereof, or of the parties interested therein, in so ruinous a condition that passengers passing by are in danger of their lives or of some bodily harm from the falling thereof, or of bricks, stones, or timber, or other materials or rubbish therefrom; and it also frequently happens that houses and other buildings erecting or repairing, or the foundations of the same, are not sufficiently fenced or guarded from the street so as to insure safety to the passengers: Be it therefore enacted that it shall be lawful for any two justices to order and direct any house or building or wall therein, which, upon view of the same by the said justices, may appear to be in a ruinous or dangerous state, to be properly fenced and guarded from the street by a proper and sufficient hoard or fence, by and at the expense of the mayor, &c., until the said premises shall be regularly and lawfully proceeded against by presentment of the grand jury at the sessions to be held for the borough, and taken down or repaired; and the owners of such houses, buildings, or walls shall reimburse and pay the expenses incurred by the mayor, &c., in fixing or putting up every such hoard or fence which shall be so ordered and directed by such justices; and the amount of the said expenses shall and may be recovered in like manner as penalties are recoverable by this Act:" see ss. 247, 248.

Sect. 59. "That, if any presentment shall be made by the grand jury at any court of general or quarter sessions, or if any four or more householders living near any house or other building or wall which may be in a ruinous or dangerous condition, shall, by writing under their hands, present to the council that such house or building or wall is in such ruinous or dangerous condition, the council, on notice of such presentment, shall cause a survey of the said house or building or wall to be made with all convenient speed by the surveyor of the council; and, if such surveyor shall find that the said house or building or wall is dangerous or ruinous, he shall immediately cause a proper hoard or fence to be put up, and shall cause notice in writing to be given to the owner or other person interested therein, if such owner or other person interested can be ascertained and found in the borough, and, if not, to be left at or fixed upon the premises, requiring him to take down, secure, or repair such house or building or wall within the space of twenty days then next ensuing; and, if such owner or other person interested shall not begin to repair, take down, or secure the house or building or wall within the said space of twenty days after such notice, and complete such repairs or taking down or securing as speedily as the nature of the case will admit, then the council shall cause such house or building or wall, or so much thereof as shall be in such ruinous or dangerous condition, to be taken down, repaired, or secured in such manner as shall from time to time be thought requisite."

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Sect. 280. "The word 'building' shall extend to and comprise all buildings and structures of what nature and kind soever, and every part of such building."

Sect. 4 of the Manchester Corporation Waterworks and Improvement Act, 1847, enacts that "the corporation by the council are hereby impowered to carry this Act and the several powers thereof into execution."

Sect. 5. "Any summons, demand, or notice, or other such document under this Act, may be in writing or print, or partly in writing or print; and, if the same require authentication by the corporation, the signature of the town-clerk thereto shall be a sufficient authentication."

Sect. 38. "In addition to the powers conferred by s. 59 of the Manchester Police Act, 1844, the corporation may, either before or after a presentment under that section, cause any building which they may consider dangerous to be watched or guarded by the police or otherwise; and, if the surveyor of the city, or, in his absence, any duly-qualified surveyor, shall certify in writing that there is imminent danger from any building, the corporation shall and may, without any presentment, notice, or other formality, cause the same to be taken down either wholly or in part, or to be repaired or secured in such manner as the corporation shall think requisite."

Sect. 39. "All charges incurred by the corporation under the Manchester Police Act, 1844, or under the preceding section, including in such charge a reasonable allowance to the corporation for the services of their officers and servants in the matter, shall and may, in addition to the remedies provided by that Act, be recoverable as a penalty under the same Act, or by action in any Court of competent jurisdiction."

Sect. 49. "With respect to the recovery of penalties the recovery of which is not otherwise provided for, ss. 247 to 261 (both inclusive) of the Manchester Police Act, 1844, are incorporated with this Act: Provided that any such penalties shall be recoverable before the stipendiary magistrate or any two justices of the peace in and for the city."

Sect. 51. "Any order or resolution of the corporation or of the council of the city, and any notice, declaration, requisition, demand, or other instrument, made, given, delivered, or served under or in pursuance or in exercise of the powers of this or any other Act, or any bye-law relating to and in force for the time being within the city, may be either in print or in writing, or partly in print and partly in writing, and shall be sufficiently authenticated by the name of the town-clerk being affixed thereto in print, lithograph, or writing."

3. At the time hereinafter mentioned, J. G. Lynde was the surveyor of the city of Manchester, and Sir Joseph Heron, Knt., was the town-clerk of the said city.

4. On the 13th of July, Lynde certified to the defendants that there was imminent danger from the aforesaid houses, Nos. 97 and 99, Market Street, in a certificate of which the following is a copy:—

To the corporation of the city of Manchester.

I, J. G. Lynde, of the city of Manchester, civil engineer, surveyor of the said city, hereby certify (in pursuance of the Manchester Corporation Waterworks and

Improvement Act, 1867, and of all other powers enabling me in this behalf) that there is imminent danger from the building described in the schedule hereto.

The schedule above referred to.

All that building situate in and No. 97 and 99, Market Street, and belonging or reputed to belong to James Cheetham, 95, Market Street. Dated this 13th of July, 1870. J. G. Lynde, City Surveyor.

5. Thereupon, on the same day, the town-clerk delivered a direction, signed by him (the town-clerk), to the city surveyor, of which the following is a copy:—

To the surveyor of the city of Manchester.

The corporation of the city of Manchester hereby direct you to cause the building mentioned in your certificate of this date to be taken down either wholly or in part, or to be repaired or secured in such manner as you shall think requisite. Dated, &c. Joseph Heron, Town-clerk.

6. On or about the same day, Lynde, the city surveyor, gave notice to the plaintiff that he had certified as above in regard to the said building, and had received the above direction. He stated to the plaintiff that the front wall of the building must be taken down; and proposed that the plaintiff should employ his own men in taking it down. There were at that time tenants of the plaintiff in the shops of Nos. 97 and 99. The plaintiff then asserted that the building was in a safe condition, and refused to accede to the above proposal; and afterwards, on the 19th of July, 1870, wrote to Lynde to the effect that he declined to take the responsibility of pulling down the shops whilst there was a tenant inside; adding the words following:—"If you take them down, you take all the risk arising therefrom."

7. After receiving the above direction, Lynde caused the said building to be taken down in part and secured in such manner as he thought requisite. He selected, at the request of the plaintiff, one Maud, a builder, to perform this work; and Maud was employed thereon by the defendants, under the directions of Lynde. In accordance with these directions, Maud took down the front wall of the building, to the top of the shops on the ground floor thereof, and a portion of the roof, and put up propping in the inside of the building for its support. Maud was a builder of competent skill; and the propping was in his opinion and in the opinion of Lynde sufficient for the support of the building. The work was begun by Maud on the 14th of July, 1870, and was finished on the 14th of August, 1870; and he then left the building; and

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the defendants did not interfere with it thereafter until after its fall, as hereinafter mentioned; and in the meantime the building was in the possession and under the control of the plaintiff.

8. On the 8th of August, 1870, Maud delivered to the defendants by their direction his bill for the charges of the work; and the bill was paid on the 11th of August, 1870, by the plaintiff, by the direction of the defendants.

9. Afterwards, on the 29th of August, 1870, the said building fell. The arbitrator found that the fall of the building was not due to negligence on the part of the defendants or of any person in their employment.

10. After the fall of the said building, Lynde, on the 29th of August, 1870, certified to the defendants that there was imminent danger from the aforesaid house No. 95, Market Street, in a certificate similar in form and contents to the certificate of the 13th of July, 1870, set out in paragraph 4 of the case, except that the building mentioned in the certificate of the 29th of August, 1870, was described therein as follows:—"All that building situate in and No. 95, Market Street, and belonging or reputed to belong to Mr. James Cheetham."

11. Thereupon, on the same day, the town-clerk delivered a direction to the city surveyor similar in form and contents to the direction of the 13th of July, 1870, set out in paragraph 5.

12. Afterwards, on the same day, Lynde delivered to the plaintiff a notice, as follows:—

City Surveyor's Office, 29 Aug. 1870.

Mr. James Cheetham.

Sir,—I have to inform you that I have this day certified that there is imminent danger from the building described in the schedule hereto, and that the same will be forthwith taken down either wholly or in part, or be repaired or secured in such manner as I may think requisite, at your expense.

J. G. Lynde, City Surveyor.

The schedule above referred to.
Shop, No. 95, Market Street.

13. After receiving the direction last mentioned, Lynde caused such part of the said building as he thought necessary to be taken down. He selected one Cookson, a builder of experience and competent skill, to perform this work; and Cookson was employed thereon by the defendants under his directions. In

accordance with such directions, on or before the 31st of August, 1870, Cookson fenced the building from the street by a hoard, and afterwards, on the 1st of September, 1870, began to take down the same, and continued to work till such parts thereof aforesaid were taken down.

14. In February, 1871, the defendants recovered the charges incurred by them in taking down in part the building No. 95, Market Street from the plaintiff before the stipendiary magistrate of the city under ss. 39 and 119 of the Manchester Corporation Waterworks Improvement Act, 1867.

15. Evidence was produced before the arbitrator, on the part of the plaintiff, to shew that at the times of the making of the certificates of the 13th of July and 29th of August, 1870, there was not imminent danger from the buildings described therein respectively; and it was contended that findings on the state of the buildings respectively at the aforesaid times ought to be inserted in the case. Some evidence was produced by the defendants to shew that at the said times there was such imminent danger from the said buildings as alleged in the certificates: but, as the arbitrator declined to insert in the case such findings except by the direction of the Court, on the ground that, if the Court should be of opinion that the certificates were sufficient justification to the defendants for the execution in respect of the said buildings of the powers given to them by the Acts referred to, such findings would be irrelevant and an improper review by him (the arbitrator) of the allegations of the city surveyor contained in the certificates,—it was agreed between the parties that the further production of evidence as to the state of the buildings at the times aforesaid should be suspended, to be resumed if the Court should direct such findings to be inserted.

16. The aforesaid directions to the city surveyor of the 13th of July and the 29th of August, 1870, were not, nor was either of them, made at any meeting of the council of the city or of any committee appointed by the council; nor was there any meeting of the council or of any such committee in regard to the subject-matter thereof; nor was there ever nor is there any resolution of the council or of any such committee delegating power to the town-clerk to make such directions.

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17. The house and shop described by the plaintiff in his declaration and particulars of demand as No. 95, Market Street, was a corner house situate at the junction of Market Street with a street called Palace Street, and abutted at the side thereof upon Palace Street.

The plaintiff included under the above description two houses of different original structure,—one, an original house No. 95, Market Street, with its front to Market Street, and a side wall upon Palace Street,—and the other a house, No. 2, Palace Street which at some time before the times mentioned in this case had been built against the back wall of the original No. 95, with the front to Palace Street, the front wall in a line with the aforesaid side wall of the original No. 95, and the front door opening into Palace Street; which two houses, before the time of the acts of the defendants in respect of the aforesaid building, No. 95, Market Street, already mentioned in this case, had been converted by the plaintiff into one set of business premises in manner hereinafter stated.

The original house No. 95 contained cellars, three floors, and an attic. Each floor had a room in front; the front room on the ground floor being the shop, and rooms at the back separated from the rooms in the front by a partition wall of nine inches in thickness, while the front wall and the back wall of the said house were each fourteen inches in thickness. The house No. 2, Palace Street, also contained a cellar, three floors, and an attic, but the first and second floors and the attic had been built on a little lower level than the corresponding floors of the original house, No. 95. This house, No. 2, Palace Street, came into the possession of and was occupied by the plaintiff at the same time with the original house No. 95 and the houses Nos. 97 and 99, Market Street, more than ten years ago. At that time and down to the times of the acts of the defendants hereinbefore mentioned in regard to No. 95, Market Street, the front door of the house in Palace Street had on it the number 2, meaning thereby No. 2, Palace Street, and the plaintiff was rated in respect thereof as a separate tenement from No. 95, Market Street. Before the time when the house No. 2 came into the possession and occupation of the plaintiff, a communication had been opened from the ground floor of the original No. 95 to

the ground floor of No. 2; and the ground floor of No. 2 then and down to the times of the acts hereinbefore mentioned was used as a workshop for No. 95: and another communication had been opened between the attics of the two houses. The plaintiff, after coming into possession and occupation of the two houses, used the front door of No. 2 as the mode of access for his workmen to the said workshop, and nailed up the staircase leading from the front door of No. 2 within No. 2, so as to prevent persons passing thereby from the ground floor to the upper floors thereof, and made a door between the ground floor of the original No. 95 and No. 2, so as to allow persons to pass from the shop in No. 95 to the workshop behind in No. 2. He also opened doors from the first and second floors of the original house No. 95 to the corresponding floors of No. 2, so that persons passed from the said floors of the original No. 95 to the corresponding floors of No. 2 through these doors by stepping down a step or two, such step or steps being rendered necessary by the difference of level already mentioned between the two houses. The attic of the original house No. 95 was used as a work-room, and, to secure quiet in the other parts of the premises, the staircase leading to the attic from the second floor of the house had been at some time cut away, and the only access for the work-people to the attic was through the attic already mentioned of No. 2, which last attic was reached by a back staircase in No. 2.

On the 29th of August, 1870, before certifying that there was imminent danger from the building described in the certificate of that date, and again, on the same day, after making the said certificate, Lynde inspected the whole of the above set of business premises. He stated in his evidence before the arbitrator that the business of the plaintiff appeared to be carried on throughout the whole premises; that his attention was not called on the occasion of either of his inspections by any one on the premises to there being any distinction between No. 95 and No. 2; nor was his attention called thereto by the plaintiff when he delivered to him the notice set out in paragraph 12 of the case; nor was his attention called thereto by the plaintiff or by any other person before the taking down of the aforesaid part of the building actually taken down.

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The counsel for the defendants then proposed to ask Lynde the following three questions: the counsel for the plaintiff objected. The arbitrator admitted the questions, subject to the questions and answers, or any of them, being struck out by the Court, if the Court should be of opinion that they ought not to have been admitted:—

First question. Did you see anything to call your attention to any distinction between No. 95 and what is called No. 2? *Answer.* I saw nothing to call my attention to such distinction.

Second question. Were you aware of any distinction between No. 95 and what is called No. 2? *Answer.* I was not.

Third question. When you gave that certificate, was it your intention to condemn the whole of the premises under the description in the certificate? *Answer.* Yes.

The aforesaid part of the building hereinbefore mentioned as taken down under the description in the aforesaid certificate of the 29th of August, 1870, included parts of the whole set of business premises above described.

The charges incurred by the defendants in taking down in part the said building, and recovered by them from the plaintiff as mentioned in paragraph 14 of the case, were the charges incurred by them for taking down the parts of the whole set of business premises above described actually taken down; and at the proceedings for the recovery of the said charges before the stipendiary magistrate of the city, the alleged distinction between No. 95, Market Street and No. 2, Palace Street, was not mentioned or set up by the plaintiff.

Some of the goods and chattels mentioned as aforesaid in the particulars of demand as goods and chattels belonging to the plaintiff's trade and business in No. 95, Market Street, were goods and chattels in No. 2, Palace Street. The "ruling-room" mentioned therein as being a room in No. 95 was the aforesaid attic of No. 2. The No. 2 "ink cellar" mentioned therein as being in No. 95 was a cellar in No. 2. And the claim therein for building materials destroyed as being in No. 95 includes building materials in No. 2.

18. The Court was to be at liberty to draw inferences as a jury from the evidence set out in the case.

The questions for the Court were,—

First, whether the certificates of the 13th of July, 1870, and of

the 29th of August, 1870, were a sufficient justification to the defendants for the execution in regard to the buildings mentioned therein respectively of the powers given to them by the Acts of Parliament.

If the Court should be of opinion that this question was to be answered in the affirmative, then the Court was asked the second question; but, if the Court should be of opinion that this question was to be answered in the negative, then it was agreed that the case was to go back to the arbitrator to find whether at the times of the making of the said certificates there was imminent danger from the buildings mentioned in them respectively: but, if the Court should be of this opinion, the Court was asked to assume, for the purpose of the case, that, at the times of the making of the certificates, there was such imminent danger as therein alleged, with a view of obtaining in both events the opinion of the Court upon the following question:—

Secondly, whether the acts done by the defendants in respect of the building mentioned in the certificates, or either of them, were a lawful execution in respect thereof of the powers given to them by the Acts.

If the Court should be of opinion that this question was to be answered in the affirmative, then the following question was submitted to the Court: but, if the Court should be of opinion that this question was to be answered in the negative, then the following question became unnecessary.

Thirdly, whether the certificate of the 29th of August, 1870, was sufficient to cover the aforesaid No. 2, Palace Street, so as to afford a justification to the defendants for the execution in respect thereof of the powers given to them by the aforesaid Acts of Parliament.

It was agreed between the parties that, after the opinion of the Court should have been obtained upon the above questions, or such of them as the Court should think necessary to be answered, the case was to go back to the arbitrator to assess the damages in accordance with the answers of the Court, and to amend, if necessary, the pleadings, so as to enable the plaintiff to give evidence of excess by the defendants in the execution of the powers given to them as aforesaid.

And it was further agreed, that if, in the course of such assess-

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ment, either of the parties should desire to obtain the opinion of the Court upon any questions of law arising in such assessment, power should be given to the arbitrator to state one or more further special case or cases for the decision of the Court upon such questions.

Jan. 18. *Sir John Holker, S.G.* (*Bayliss* with him), for the plaintiff. The first question is whether the certificate of the surveyor is conclusive and indisputable. That depends upon the construction of s. 38 of the Act of 1867, which materially exceeds in stringency the powers contained in the Police Act of 1844. It is submitted that the certificate merely excuses what otherwise would be a trespass; and that an action will still lie against the corporation if it can be shewn to the satisfaction of a jury that the imminent danger did not in fact exist. Certificates under the Metropolis Local Management Acts (1) have been held by this Court not to be conclusive: see *St. George, Hanover Square* v. *Sparrow* (2); *Simpson* v. *Smith.* (3)

[LORD COLERIDGE, C.J., referred to *Bauman* v. *St. Pancras Vestry* (4), where the doctrine of this Court in the cases cited was not approved of; and observed that the Act in question says that the thing shall be done by the corporation, and that "without any presentment, notice, or other formality," which materially distinguishes those cases.]

Cooper v. *Wandsworth Union* (5) shews that a power of this very stringent kind is not to be exercised without giving the party to be affected by it an opportunity of being heard in defence of his property.

The next question is whether the corporation have pursued the power so vested in them by s. 38. The corporation formed no conclusion on the matter at all: all that was done was done by the surveyor acting under a supposed authority given to him by the town-clerk. By s. 4 "the corporation by the council are impowered to carry the Act and the several powers thereof into execution."

(1) 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 107.

(2) 16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118.

(3) Law Rep. 6 C. P. 87.

(4) Law Rep. 2 Q. B. 528.

(5) 14 C. B. (N.S.) 180; 32 L. J. (C.P.) 185.

[DENMAN, J. By s. 5 the signature of the town-clerk to any document is a sufficient authentication thereof by the corporation. Here, the surveyor acted upon a direction so authenticated.]

Paragraph 16 of the case shews that the corporation were never consulted, nor were the council or any committee of the council. The whole was the act of the city surveyor and the town-clerk. The corporation did nothing.

[LORD COLERIDGE, C.J. The case finds (paragraph 13) that the corporation employed the builder and paid for the work. At all events, they ratified and adopted the acts of their officers.]

Ratification may exempt those who did the acts from liability for the trespass; but that is all. It cannot make their irregular acts acts done by the corporation in pursuance of the powers with which the statute has armed them.

Then, the certificate as to No. 95, Market Street, affords the defendants no justification for pulling down No. 2, Palace Street, which the case finds to have been an entirely separate building, in respect of which Mr. Cheetham was separately rated. The mere fact of their having been used together as one set of business premises can make no difference in this respect.

R. G. Williams, Q.C. (*Sir John Karslake, Q.C.*, and *E. Sutton* with him), for the defendants.

[LORD COLERIDGE, C.J. We entertain no doubt upon the first point: we are all of opinion that the certificate of the city surveyor was primâ facie conclusive. Confine your argument to the questions of ratification and the sufficiency of the certificate and notice of the 29th of August.]

The case finds that the corporation, acting upon the certificate of the surveyor, employed and paid a builder for pulling down and restoring the building. No particular mode of action is pointed out by the statute. The direction of the town-clerk was unnecessary. The corporation are to act promptly upon the certificate of their surveyor: they are not called upon themselves to form a judgment in the matter. In the absence of a precedent authority from them, their subsequent ratification of the acts of their surveyor will do. As to the form of the certificate and notice,—The two houses, No. 95, Market Street, and No. 2, Palace Street, formed one set of business premises occupied together by

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the plaintiff. The terms of the notice, therefore, could not possibly have misled him.

Sir John Holker, S.G., was heard in reply.

Cur. adv. vult.

LORD COLERIDGE, C.J. This case turns almost entirely upon the construction of two private Acts for the government of the city of Manchester, by which the mayor and corporation are impowered to pull down and repair or rebuild dangerous buildings. The case is simple in its facts. The plaintiff was the owner of several houses in Market Street, Manchester, amongst others of two numbered respectively 97 and 99, and also of No. 95, adjoining to which was another house belonging to him and being No. 2 in Palace Street; the two latter houses having been by internal communication as described in the case converted into one set of business premises. All these premises were in a dangerous condition.

As to Nos. 97 and 99, Market Street, due notice of their condition having been given to the owner in pursuance of the Acts, the city surveyor, in July, 1870, caused the front walls to be pulled down and rebuilt. The work, which the case finds to have been properly done, was finished by the 14th of August, and the expenses thereby incurred were paid by the plaintiff. But on the 29th of August the building fell down.

As to No. 95, Market Street and No. 2, Palace Street, the facts were these:—The city surveyor having reported the premises to be dangerous, the town-clerk, purporting to act for the corporation, gave directions to the surveyor to cause the same to be taken down and repaired or rebuilt; and the work was done by persons employed and paid by the corporation, and the expenses were recovered under the Act. This action is brought to recover back the moneys so paid, on the ground that the expenses were improperly and unnecessarily incurred.

Three points only are material to be considered:—first, whether the certificate given by the city surveyor that there was imminent danger from the building described was conclusive,—secondly, whether the corporation of Manchester did or did not act in accordance with the powers of their Acts of Parliament,—thirdly,

whether the notice of the 29th of August, 1870, describing the premises to be pulled down as "No. 95, Market Street," was a sufficient notice.

The sections of the Acts of Parliament upon which the questions turn are simple and plain. I will take them in chronological order. The Manchester Police Regulation Act, 1844 (7 & 8 Vict. c. xl), which contains nearly three hundred clauses, has, amongst other provisions, a short code as to dangerous buildings, commencing with s. 58, and ending with s. 64. Sect. 58 recites that "it frequently happens that houses and other buildings and walls, are, either from litigated titles thereto, or the obstinacy, neglect, or poverty of the owners thereof, in so ruinous a condition that passengers passing by are in danger of their lives or of some bodily harm from the falling thereof," &c., and enacts that two justices may order such premises to be properly fenced until they can be proceeded against by presentment. Sect. 59 enacts that, on presentment, or notice by four householders to the town council that a building is dangerous, the surveyor shall give notice to the owner to repair the same; and by s. 61 the owner is to be charged with the expenses thereof, and by s. 62, which is a still stronger provision, the same remedy is given against the occupier, to the extent of the rent accruing due from him. That being the state of things under the Act of 1844, it was, I presume, found from experience that even these very stringent enactments did not suffice to secure Manchester from the dangers recited, because in the Act of 1867, 30 Vict. c. xxxvi, the powers given to the corporation and its officers were very considerably enlarged. The 38th, which is the important section of that Act, enacts that, "in addition to the powers conferred by s. 50 of 7 & 8 Vict. c. xl, the corporation may, either before or after a presentment under that section, cause any building which they may consider dangerous to be watched or guarded by the police or otherwise; and, if the surveyor of the city, or, in his absence, any other duly-qualified surveyor, shall certify in writing that there is imminent danger from any building, the corporation shall and may, *without any presentment, notice, or other formality*, cause the same to be taken down either wholly or in part, or to be repaired or secured in such manner as the corporation shall think requisite." Then s. 39

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provides that, in addition to the remedies for the recovery of the expenses under the former Act, they shall be "recoverable as a penalty under the same Act, or by action in any Court of competent jurisdiction."

The only condition precedent to the action of the corporation is, that "the surveyor of the city, or, in his absence, any other duly-qualified surveyor," shall certify that the building is dangerous; and then the corporation, not merely may, but *shall* cause them to be taken down or repaired.

It may be material to notice two other sections of the Act of 1867 which were alluded to in the argument, viz. ss. 4 and 5. By s. 4, "the corporation by the council are impowered to carry the Act and the several powers thereof into execution;" and s. 5 provides that, if any notice or other document under the Act require authentication by the corporation, the signature of the town-clerk thereto shall be a sufficient authentication.

That being the state of the law, let us see what was done here. And, first, as to the houses Nos. 97 and 99, Market Street. The premises being dangerous, Lynde, the city surveyor, on the 13th of July, 1870, certified to the corporation that there was imminent danger from "the building situate in and No. 97 and 99, Market Street," belonging to the plaintiff. Upon that certificate, the town-clerk of Manchester on the same day issued a direction to the surveyor in these terms,—"The corporation of the city of Manchester hereby direct you to cause the building mentioned in your certificate of this date to be taken down either wholly or in part, or to be repaired or secured in such manner as you shall think requisite." The surveyor thereupon took down and rebuilt the front wall of the building, the work being done, as is found by the case, by persons [employed and paid by the corporation, and without negligence: and the expenses incurred were paid by the plaintiff. The building subsequently fell down.

Shortly afterwards, viz. on the 29th of August, a similar certificate was given by the surveyor as to the "building" No. 95, Market Street, and the town-clerk issued a similar direction to the surveyor to pull down the building described in that certificate; and, after notice to the plaintiff, the owner, the surveyor proceeded to take down certain parts of the building indicated; and in

February, 1871, the corporation recovered from the plaintiff before the stipendiary magistrate, under ss. 39 and 119 of the Act of 1867, the charges so incurred by them. Nothing was said either in the surveyor's certificate, or in the town-clerk's direction to the surveyor, or in the notice to the plaintiff, about No. 2, Palace Street.

These are all the material facts. It appears that a certificate was given by the city surveyor, with regard to all the buildings in question, that there was imminent danger therefrom. So far, therefore, the condition precedent contained in s. 38 of the Act of 1867 has been complied with. But, if the point I am about to refer to be tenable, it was necessary to go further. Now, the first objection taken to the certificate is, that it is not conclusive as to the imminence of the danger, and that, although the certificate might exempt the corporation from liability to an action of trespass, still they must make compensation to the party injured if it should afterwards turn out that the certificate was contrary to the fact or the direction founded thereon given without authority. I am, however, of opinion that the certificate was intended to be and is made conclusive of the fact stated therein; and that, on production of that certificate, the corporation are protected in doing the act and entitled to recover the expenses incurred by them in doing it. The language of s. 38 is not permissive merely: it is imperative,—if the surveyor shall certify the building to be dangerous, the corporation *shall* cause it to be taken down, and this without any presentment, notice, or other formality. The cases which were cited for the purpose of shewing that the certificate of the surveyor is not conclusive, viz. *Cooper* v. *Wandsworth District Board of Works* (1), *St. George, Hanover Square*, v. *Sparrow* (2), and *Simpson* v. *Smith* (3), arose either upon the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), or the Metropolis Local Management Act, 1862 (25 & 26 Vict. c. 107, s. 75), the language of which, though somewhat like that of the section now under consideration, is not nearly so strong. Although the Court of Queen's Bench, in *Bauman* v. *Vestry of St. Pancras* (4),

(1) 14 C. B. (N.S.) 180; 32 L. J. (C.P.) 185. *J. in K.S. 1155.*

(2) 16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118. *16 Jur. N.S. 711*

(3) Law Rep. 6 C.P. 87.

(4) Law Rep. 2 Q. B. 528.

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intimated an opinion that the certificate of the superintending architect was conclusive as to the general line of building, yet, sitting as I am as a judge of the Court of Common Pleas, if it were necessary to decide, and the words to be construed were the same, I should have felt myself bound to act upon the decisions here rather than upon the opinion expressed in the case in the Queen's Bench, and to hold that the certificate was examinable in after-proceedings. But it is not necessary upon this occasion to consider those cases, inasmuch as there were no such words in the clauses then under consideration as there are in the clause which we have to construe,—"without any presentment, notice, or other formality." It is enough, therefore, to say that those cases have no application to the present; and that I am clearly of opinion, upon the words of s. 38 of the Act of 1867, that the certificate of the surveyor is and was intended to be conclusive, and that the corporation were justified in acting upon it and were bound to act upon it.

Then, the Solicitor General argued that, conceding that to be so, still the *corporation* must act in the matter, and here they have not done so. Now, the words are, "the corporation shall and may, without any presentment, notice, or other formality, cause the same to be taken down either wholly or in part, or to be repaired or secured in such manner as the corporation shall think requisite." The directions given to the city surveyor on the 13th of July and 29th of August, he says, the case expressly finds to have been given, not by the corporation, but by the town-clerk. They were not given at any meeting of the council or of any committee of the council; nor was there any intention expressed by the corporation to delegate to the town-clerk authority to give such directions; but he took upon himself to give them: and therefore, the Solicitor-General contends that the corporation have not pursued the powers of the Act. Now, the Act of 1867 provides in s. 4 that the corporation by the council are to carry it into execution: but s. 5 enacts that every notice or other document which requires authentication shall be considered to be sufficiently authenticated if signed by the town-clerk: and here the directions were duly signed by the town-clerk: but they purport to be given by the corporation of the city of Manchester; and it is found in both

instances that the persons who did the work were employed and paid by the corporation, and that they were so employed to do work which the city surveyor had certified to be necessary.

I am of opinion, upon two grounds, that the Act has been complied with here. In the first place, it is found in the case that the corporation have acted in the matter. The orders were given in their name, authenticated by the signature of the town-clerk; and they employed and paid the persons who did the work, and therefore they must be taken to have considered that it was requisite that it should be done; and they received from the owner the amount of the expenses they had incurred in doing it. Upon a case in which it is agreed that the Court shall draw inferences of fact, what other inference can we draw than that the acts done were authorized by the corporation? Further, it appears to me that there is abundant evidence of ratification by them of the acts of their officers: and I see no reason why that should not suffice to bring them within the provisions of the Act. It has been suggested by the Solicitor-General that, although there might be a sufficient ratification to save the persons who did the acts from being liable in trespass, still that would not make their acts the acts of the corporation,—in other words, that the ratification might enure against the corporation, but not for their benefit. I am not, however, aware of any authority, and no argument occurs to my mind, upon which the distinction suggested could be founded. If a ratification at all, it is difficult to see how it can be a ratification of the qualified kind contended for. I am therefore of opinion that the second point urged on behalf of the plaintiff also fails, and that the corporation have acted within the authority conferred upon them by the Act.

The third point is of a somewhat technical character. It is said that the certificate of the surveyor was bad, and therefore what was done under it cannot be justified. This objection does not apply to the houses No. 97 and 99, Market Street. As to No. 95, Market Street and No. 2, Palace Street, the difficulty is this:—The certificate describes the thing aimed at as a "building," and in the schedule it is called "Shop, No. 95, Market Street." It appears from the statement in paragraph 17 of the case that the building intended to be thus described consisted not only of No. 95, Market Street,

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but also of No. 2, Palace Street, which though rated as a separate tenement had for some years been occupied by the plaintiff together with No. 95, Market Street, as one set of business premises, with internal communications both on the ground floor and upon an upper floor, access to the top floor of 95, Market Street being gained only by passing up the staircase of No. 2, Palace Street. So far as could be seen by an inspection of the business premises on the ground floor, the whole formed one shop or building. Under these circumstances, it is said that the certificate and notice did not point at No. 2, Palace Street at all, and, professing to cover both premises, covered neither. I am of opinion that the notice was sufficient. The plaintiff could not have been misled by it. The two houses were evidently intended to be described under the word "building," which it may be observed was used in the former notice as comprehending Nos. 97 and 99, Market Street. I am therefore of opinion that the third objection also fails.

Some remarks have been made as to the stringent character of the provisions in s. 38 of the Act of 1867. I agree that those provisions are somewhat stringent. But it seems to me that the Act is a very salutary one; and, if general convenience and the interests of the public require them, however stringent enactments may be, private rights and interests must give way, and the law must not be suffered to remain a dead letter. For these reasons I am of opinion that the defendants are entitled to the judgment of the Court.

KEATING, J. I am of the same opinion: and, after the minute and careful statement of the facts by my Lord, I have but little to add. As to the first point, I think it would be impossible to give any effect to the Act unless we held the certificate of the surveyor to be conclusive. The provision in s. 38 is, no doubt, a very stringent one, vesting in the surveyor, as it does, absolute power to say that a man's house shall be pulled down. The legislature, however, appears to have thought it necessary to confer upon him this power; and it is our business to see that their intention is carried out. It would be impossible for the corporation to act at all if a question could in every case be raised before a jury as to the propriety of the certificate. With regard to the

cases cited, as I was a party to the decision of the first of them, viz. *St. George, Hanover Square*, v. *Sparrow* (1), I may be allowed to observe, with the greatest deference for the Court of Queen's Bench, that I think this Court was justified in holding that the certificate of the surveyor was not conclusive, inasmuch as the Act of Parliament then under consideration interposed a judicial tribunal between the builder and the vestry. It is enough, however, to say that the provisions of the Act now before us are totally different. The question upon which I have entertained some doubt is, whether the ratification by the corporation of the acts of its officers was equivalent to an authority given ab initio. But, upon consideration, I come to the conclusion at which my Lord has arrived, viz. that the ratification was sufficient. The corporation were bound to act upon the certificate of their surveyor. The order or direction of the town-clerk ought, strictly speaking, perhaps, to have been given after some consideration by the corporation. But the case finds that the building was taken down by persons employed and paid by them. The utmost that can be said, I think, is, that the certificate of the surveyor and the acts done under it were so ratified by the corporation as to make the whole their acts. As to the third point, I entirely agree with my Lord that the description given of the premises in the certificate and notice was sufficient.

DENMAN, J. I also agree that there must be judgment for the defendants, and I rest my judgment on s. 38 of the 30 Vict. c. xxxvi, and on that only, some light being thrown on that enactment by the state of the law under the Act of 1844. I also think that none of the cases cited have any bearing upon this, the objects and provisions of the statutes upon which they were decided being totally different from those of the Act which we are now called upon to construe. The first question is, was the certificate of the city surveyor conclusive? For the reasons given by my Lord and my Brother Keating I think it was. Looking at the subject-matter with which s. 38 of the Act of 1867 was dealing, it would be impossible to work out the object the legislature had in view unless the certificate were held to be conclusive. It was necessary that

(1) 16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118.

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some person should have power to form a judgment upon which prompt action could be taken. The suggestion of the Solicitor-General that the council or a committee should first consider the matter, is utterly impracticable. I cannot conceive anything more improbable than that the legislature should have intended that the opinion of a jury should be taken in each case as to whether there was or was not imminent danger from the building. Then it is urged by the Solicitor-General that the corporation ought themselves to form a judgment, and not rest merely upon the certificate of the surveyor and at once act upon that. I am of opinion that that is not the proper construction of the Act. The assumption is that the building is in imminent danger of falling. Prompt action is necessary. Armed with the authorization of the town-clerk, the surveyor is bound to do the work at once, unless the corporation interfere and forbid it. By the necessity of the thing, the doing of the work is the act of the corporation itself. That again turns upon the construction to be put upon the enactment in question. The provisions of the earlier Act were evidently found not to be sufficiently stringent to meet the difficulties of the case, and too cumbrous, and therefore the enactment in s. 38 of the Act of 1867 was passed. The next argument was, that the second certificate and notice did not sufficiently identify the premises to be pulled down. If that were so, there would be no justification for the acts of the corporation. But here we have power reserved to us to draw inferences from the facts; and, looking at the statements in paragraph 17 as to the way in which the premises No. 95, Market Street, and No. 2, Palace Street, were occupied by the plaintiff, and at the internal communications between them, the only inference I am able to draw is that No. 2, Palace Street was occupied by the plaintiff as a substantial part of No. 95, Market Street, and that they were fairly described as such in the certificate. Upon all the points, therefore, I agree that there must be judgment for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *Gregory, Rowcliffes, & Co., for W. L. Welsh, Manchester.*

Attorney for defendants: *R. Freer Austin, for Frederick Stephen Austin, Manchester.*

ANGLO-EGYPTIAN NAVIGATION COMPANY *v.* RENNIE AND ANOTHER.

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Feb. 25.

Contract for Work to be done upon a Ship—Property in Articles manufactured for the Purposes of such Contract—Payments during the Progress of the Work—Completion of Contract prevented by Loss of the Ship—Money had and received—Failure of Consideration.

The defendants contracted with the plaintiffs to make and supply new boilers and certain new machinery for a steamship of the plaintiffs, and to alter the engines of such steamship into compound surface condensing-engines, according to a specification.

The engines, boilers, and connections were, by the contract, to be completed in every way ready for sea so far as specified, and tried under steam by the engineers (the defendants) previous to being handed over to the company; the result of such trial to be to the satisfaction of the company's inspector.

The price of the work was to be 5800*l.*, and was to be paid as the work progressed, in the following manner, viz., 2000*l.* when the boilers were plated, and 2000*l.* when the whole of the work was ready for fixing on board, and the balance, 1800*l.*, when the work was fully completed and tried under steam. These payments were only to be made on the certificate of the plaintiffs' inspector. The old materials removed from the ship were to become the property of the defendants. The specification contained elaborate provisions as to the fitting and fixing the new boilers and machinery on board the ship, and the adaptation of the old machinery to the new. The boilers and other new machinery contracted for were completed, and ready to be fixed on board, and one instalment of 2000*l.* had been paid under the contract, when the ship was lost by perils of the sea.

The value of the work actually done by the defendants under the contract amounted to 4118*l.* The second instalment of 2000*l.* was subsequently paid, at the time of which payment the plaintiffs knew of the loss of the ship, but the defendants did not.

The plaintiffs claimed delivery of the boilers and other machinery completed under the contract, and this being refused, brought an action for the detention of the same, or to recover back the 4000*l.* paid by them to the defendants:—

Held, that the contract was an entire and indivisible contract for work to be done upon the plaintiffs' ship for a certain price, from further performance of which both parties were released by the loss of the ship; that the property in the articles manufactured was not intended to pass until they were fixed on board the ship; and that consequently the plaintiffs were not entitled to the boilers and machinery, nor could they recover the 4000*l.* already paid as upon a failure of consideration.

Appeal from but compromised post 571

SPECIAL CASE stated in an action for the detention of certain boilers and machinery, and for the recovery of two sums of 2000*l.* paid by the plaintiffs to the defendants.

The facts of the case sufficiently appear from the judgment.

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H. Matthews, Q.C. (*Arthur Wilson* with him), for the plaintiffs. The property in the boilers and machinery so far as they were finished passed to the plaintiffs under the contract. The general rule, no doubt, is, that, under a contract for the manufacture of a chattel, nothing passes to the buyer until the chattel is in a complete state and has been appropriated to the contract. But where, as here, the work has been done under the inspection of a person employed by the buyer, and moneys have been paid upon his certificate that it has reached certain prescribed stages, that has been held to be a sufficient appropriation of the article in its then state to take the case out of the general rule: *Woods* v. *Russell* (1); *Wood* v. *Bell.* (2)

[LORD COLERIDGE, C.J. The argument on the other side will probably be that this was a contract for work to be done at an entire price, and consequently that nothing passed to the plaintiffs until fixed on board the vessel.]

The same argument might have been urged in the cases cited. Mr. Benjamin, in his Treatise on the Sale of Personal Property, 2nd ed., p. 245, speaking of *Clarke* v. *Spence* (3), says: "Much stress had been laid, in argument, upon a passage in the opinion delivered by Bayley, J., in *Atkinson* v. *Bell* (4), in which he said that 'the foundation of the decision in *Woods* v. *Russell* (1) was, that, as by the contract, given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price *the ship was irrevocably appropriated to the person paying the money;* that was a purchase of the specific articles of which the ship was made.' In commenting upon this dictum, Williams, J., shewed that in *Woods* v. *Russell* (1) the decision did not turn upon any such point, although there were extra-judicial expressions strongly tending to that view; and he continued (5): 'If it be intended in this passage that the specific appropriation of the parts of a vessel while in progress, however made, of itself vests the property in the person who gives the order, the proposition in so general a form may be doubtful . . . . Until the last of the necessary materials be added, the vessel is not

(1) 5 B. & Ald. 942.
(2) 6 E. & B. 355; 25 L. J. (Q.B.) 321.
(3) 4 Ad. & E. 448.
(4) 8 B. & C. 277, 282.
(5) 5 B. & Ald. at p. 467.

complete; the thing contracted for is not in existence; for, the contract is for a complete vessel, not for parts of a vessel, and we have not been able to find any authority for saying that while the thing contracted for is not in existence as a whole and is incomplete, the general property in such parts of it as are from time to time constructed shall vest in the purchaser, except the above passage in the case of *Woods* v. *Russell*. (1) The Court, however, held that the passage cited from *Woods* v. *Russell* (1) was "founded on the notion that provision for the payment regulated by particular stages of the work is made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and *is an equivalent to an express provision that, on payment of the first instalment, the general property in so much of the vessel as is then constructed shall vest in the purchaser.* The Court, with the intimation of a wish that the intention of the parties had been expressed in less ambiguous terms, deliberately adopted this dictum from *Woods* v. *Russell* (1) as *a rule of construction* by which, in similar ship-building contracts, the parties are held to have by implication evinced *an intention that the property shall pass,* notwithstanding the general rule to the contrary. The law thus established has remained unshaken to the present time."

[DENMAN, J. This is substantially a contract for work and labour, and not a contract of sale.]

In *Wilkins* v. *Bromhead* (2), where a carpenter was employed to make a greenhouse, the whole of which was completed but not permanently fixed together, and the agreed price paid, but the greenhouse at the employer's request was retained on the maker's premises until after he had become bankrupt, this Court held that there had been a sufficient appropriation to pass the property in the greenhouse to the employer. *Clarke* v. *Spence* (3), where the contract was for the building of a ship for a given sum, to be paid by certain instalments as the work progressed, was a decision to the same effect. And this was followed by *Wood* v. *Bell*. (4)

[LORD COLERIDGE, C.J. The passage cited by Mr. Benjamin from the judgment of Williams, J., in *Clarke* v. *Spence* (3) shews

(1) 5 B. & Ald. at p. 946.
(2) 6 M. & G. 963.
(3) 4 Ad. & E. 448.
(4) 6 E. & B. 355; 25 L. J. (Q.B.) 321.

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there is no appropriation until the ship is complete. The judgment goes on to shew (1) that payment is wholly immaterial to the vesting of the property.]

Then the vessel in this case, the *Scanderia*, having been lost at sea, both parties were excused from further proceeding with the contract. Where a contract impliedly assumes the existence of a particular or specific person or thing, it is to be construed in the absence of an express or implied warranty that the existence of the person or thing shall continue, as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible, from such person or thing ceasing to exist: *Laughter's Case* (2); *Willams* v. *Hide* (3); *Taylor* v. *Caldwell* (4); *Boast* v. *Firth* (5); *Appleby* v. *Meyers*. (6) In delivering the judgment of the Court of error in the last-cited case, Blackburn, J., says (7): "We think that where, as in the present case, the premises are destroyed [or, in this case, the ship is lost] without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract, but giving a cause of action to neither."

Then, as to the defendants' claim of lien. It appears from the case that the defendants have done work under the contract to the value of 4118*l.*, and that they have received two payments of 2000*l.* each. The boilers were to be fixed on board the *Scanderia* before their claim for the balance of the agreed price, 1800*l.*, could arise; and then they would have parted with them. The claim of lien, therefore, is inconsistent.

[KEATING, J. You can only deprive them of their lien by resorting to the contract: and that has been put an end to by the act of God.

GROVE, J., referred to *Jervis* v. *Tomkinson*. (8)]

Then, the defendants have waived their lien, if they ever had it, by claiming 1800*l.*, when the utmost they could be entitled to was 118*l.*: *Dirks* v. *Richards* (9); *Kerford* v. *Mondel*. (10)

(1) 4 Ad. & E. at p. 469.
(2) 5 Co. Rep. 21 b.
(3) Palm. 548.
(4) 3 B. & S. 826; 32 L. J. (Q.B.) 164.
(5) Law Rep. 4 C. P. 1.
(6) Law Rep. 1 C. P. 615; in error, Law Rep. 2 C. P. 651.
(7) Law Rep. 2 C. P. at p. 659.
(8) 1 H. & N. 195.
(9) 4 M. & G. 574; 26 L. J. (Ex.) 41.
(10) 28 L. J. (Ex.) 303.

12 Jur. N.S. 500.

If the contract is wholly rescinded, or if the property in the boilers did not pass to the plaintiffs, they have paid 4000*l.* upon a consideration which has failed; and consequently they are entitled to recover it back.

Benjamin, Q.C. The contract in the present case is not one of sale, as to which very different considerations would apply, but one of work and labour. It is an entire contract for the repair of a ship with materials partly old and partly new. The complicated nature of the work to be done before the contract was completed renders it impossible to attribute the payments made to any particular part of the work. The payments were simply intended to be payments on account of the whole price of the entire work. Apart from any specific provision for payment as the work progressed, the defendants could not have recovered a penny until the whole of the work was completed: *Appleby* v. *Meyers*. (1) However little remained to be done they must, if the vessel was lost, have lost all claim to remuneration. They expressly stipulate for payment as the work progresses, in order to prevent such a result, and to throw some portion of the risk on the other party. There is nothing in such a provision to shew that there was any intention that the property in boilers and other articles, constructed with a view to the contract, but not affixed to the ship, should pass upon the payment of these instalments. The plaintiffs have no right to split up the contract, and take part of what was to be done as against part payment of the price. But for the express stipulation the defendants on the loss of the vessel must have borne all the loss; by that stipulation they have thrown the loss on the plaintiffs. But this does not affect the construction of the contract in other respects: it remains an entire and indivisible contract. The plaintiffs knew of the loss of the ship when they paid the second instalment. Consequently the money paid cannot be said to have been paid upon a consideration which has since failed. The sums of money to be paid in advance do not correspond to the value of the articles manufactured at the time of such payments. Besides, the defendants have not received the old materials, and cannot now receive them.

Arthur Wilson, in reply. The action is not upon the contract;

(1) Law Rep. 2 C. P. 651.

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the contract has not been, and never can be, carried out; the plaintiffs' claim must depend on the fact of the property having passed or upon failure of consideration. It is conceded that if this were to be looked upon as the case of a contract of sale the property would have passed. The distinction relied upon is that this is not a contract to build a ship, but to repair one. It is contended that upon the true construction of the contract it consists of two component parts, which may be severed. It is a contract for the sale of certain machinery, plus a contract to do work in fixing it and in altering part of the existing machinery. A sale is simply a transfer of property for consideration. Quoad the things to be made this is a contract of sale. All that has to be done with respect to them is to make them according to the specifications.

The substance of the contract must be looked at, and it will be found, when so regarded, that the bulk of it is for the manufacture of certain engines to be fixed on board the plaintiffs' ship. The stipulation for payment in instalments is for the protection of both parties, that the one party may not lose the price of the things provided by the loss of the ship before the contract is completed, and, on the other hand, that the other party may not have to pay the price and receive no equivalent for it. There is no reason why it should be construed so as to shift all the risk from one side to the other.

It is quite consistent with the terms of the contract, and manifestly in accordance with the justice of the case, that the true construction is that the property should pass in the articles, when manufactured from time to time, on payment of the instalments due.

He cited *Lee* v. *Griffin*. (1)

Cur. adv. vult.

Feb. 25. The judgment of the Court (Lord Coleridge, C.J., and Grove and Denman, JJ., (2)) was delivered by

DENMAN, J. This was a special case stated without pleadings in an action in which the plaintiffs claimed to recover certain

(1) 1 B. & S. 272; 30 L. J. (Q.B.) 252.

(2) Keating, J., who heard the argument, had resigned at the end of Hilary Term.

boilers and machinery detained by the defendants, with damages for their detention, or to recover back two sums of 2000*l.* each paid by the plaintiffs to the defendants as stated in the case. In case our judgment should be for the plaintiffs for the recovery of the goods, judgment was to be entered for 5000*l.*, to be reduced to 40*s.* on the goods being delivered up. In case we should decide for the plaintiffs on the other ground, judgment was to be entered for 4000*l.* The two questions for the Court therefore are, whether, under the circumstances of the case, either detinue or money had and received could be maintained.

The material facts of the case were as follows:—On the 18th of December, 1871, the plaintiffs, a shipping company in London, being owners of two steamships, the *Minia* and the *Scanderia*, entered into a written contract with the defendants, engineers in London, which is set out in the special case, and the terms of which, so far as they are material, are as follows:—

The engineers agree to make and supply to the company new marine boilers and various parts of machinery for the screw-steamers *Minia* and *Scanderia* belonging to the company, and to alter the engines of those steamers into compound surface condensing engines, according to specification annexed. The engines and boilers and connections are to be completed in every way ready for sea so far as specified, and tried under steam by the engineers previous to being handed over to the company; the result of such trial to be to the satisfaction of the company's inspector.

The work to be commenced without delay, and completed with all reasonable dispatch. Due notice shall be given by the company to the engineers of the date at which the steamers will be placed in their hands after the work is ready, to have the engines completed. Each of the steamers shall be completed ready for sea within sixty working days from the date at which she is placed in the hands of the engineers.

The price to be paid by the company to the engineers in respect of this agreement shall be the sum of 5800*l.* for each steamer, payable as the work progresses, in the following manner, viz. When the boilers are plated, 2000*l.*, half cash, half by the company's acceptance at four months' date; when the whole of the work is ready for fixing on board, 2000*l.*, half cash, half by the company's

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acceptance at four months' date; when each steamer is fully completed and tried under steam, 1800*l.*, whereof 1000*l.* cash, and 800*l.* in acceptances at four months. All bills to be approved.

The contract then contained a guarantee by the engineers against bad materials or workmanship, and an undertaking to make good for six months; and then it continued as follows:—

"All the work hereby contracted to be done by the engineers shall be executed to the satisfaction of John Pile, or other the company's inspector for the time being; and all the payments agreed to be made by the company shall only be made on the certificate of such inspector that the conditions entitling the engineers to receive such payment have been fulfilled."

The contract contained an arbitration clause.

The specification referred to in the contract was headed "The work hereby specified to be done to each of the steamers *Minia* and *Scanderia*," and contained, amongst other matters, the following provisions and requirements:—

"Four new boilers of oval form to be fitted and fixed on board; each boiler to have two furnaces, and to be provided with all necessary fittings," &c.; "the boilers to be cleaded with felt and wood, or patent cement, as may be determined, with all necessary piping to fit and fix them to the engines;" funnel casings to be removed and replaced; old boilers to be cut up in ship, and removed in pieces, so as not to disturb the deck."

Then followed provisions relating to alterations to be made in the cylinders, and providing several articles, such as new cylinder covers to be put on the old cylinders, with glands, slide-rods, and "all that may be necessary to make the engines complete compound and surface condensing engines."

Then followed a provision that a surface condenser containing 2000 cubic feet of tube cooling surface was to be supplied; and immediately afterwards it was specified as follows: "One of the present air-pumps to be arranged as a circulating pump; both the pump and the other air-pump now in the ship to have foot valves fitted, if they are not so at present;" "waste-water valves to be fitted to ship; the present waste-water valve chest to remain for the air-pumps discharge;" "all present piping in connection with boilers to be condemned, and replaced with copper piping sufficient

to bear the increased pressure;" "all brasses to be set together, and *the whole job* to be put in thorough working order so far as the new work is concerned;" "in conclusion, it is intended that the engineers shall remove the present boilers and such parts of the machinery *as may be necessary* to make the above alterations, *giving new boilers and complete machinery instead*, and so as to comply with the requirements of the Board of Trade, whose certificate they are to obtain as far as the work which they engage to do extends."

The case finds that under the contract the whole of the old materials to be necessarily taken from each ship by reason of the execution of the work contracted to be done would become the property of the defendants, and that the value of such old materials in each ship was 353*l.* At the date of the contract, the 18th of December, 1871, the *Scanderia* was in the port of London. The contract, so far as relates to the *Minia*, was performed on both sides; and no question arises as to that ship.

On the 28th of June, 1872, the plaintiffs gave notice to the defendants that the *Scanderia* was ready to be placed in their hands on the 1st of August next, to receive her boilers and machinery. But, upon hearing from the defendants on the 28th of June that they could not promise to be ready by the 1st of August, the plaintiffs determined to send her on another voyage. She sailed from Cardiff accordingly in August, and on her return voyage was lost by perils of the sea.

On the 15th of August, 1872, the boilers for the *Scanderia* were plated. On the 27th of August the plaintiffs' inspector certified that the defendants were entitled to receive the first sum of 2000*l.* in respect of that ship; and on the 28th of August the plaintiffs paid the same in the manner provided by the contract.

On the 4th of January, 1873, the whole of the work was ready for fixing on board the *Scanderia*, and on the 15th the plaintiffs' inspector so certified, and that the conditions entitling the defendants to the second sum of 2000*l.* had been fulfilled; and the plaintiffs on the 17th of January paid that sum as before. At the time of the last-mentioned payment, the plaintiffs knew, but the defendants did not know, of the loss of the vessel.

On the 25th of April, 1873, the defendants, having heard of the

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loss of the *Scanderia*, wrote requesting the plaintiffs "to pay the balance due on the contract, amounting to 1800*l*." On the 26th the plaintiffs replied that, "looking at the work which the defendants had not been called upon to perform, they considered that they had already paid all that they could be required to pay in respect of the engines, if indeed they had not already paid more than a proportionate part of the contract price."

On the 10th of May, 1873, the plaintiffs gave notice to the defendants stating that the contract of the 18th of December, 1871, having come to an end, they required the defendants to deliver to the plaintiffs the boilers and other machinery and things made by the defendants under the contract, and, in default of delivery, threatened proceedings. On the 21st of May the defendants' solicitors wrote, stating that the defendants were willing to hand over the boilers and other machinery asked for, "on being paid the amount of their lien." Subsequently, on the 23rd and 28th of May, in answer to letters of inquiry as to their meaning, the defendants' solicitors wrote that the amount claimed by the defendants as their lien was the amount of the last instalment under the contract, viz. 1800*l*. They, however, proposed that the question should be disposed of under the arbitration clause, which offer was declined by the plaintiffs.

The case further stated:—"The total sums paid under the contract by the plaintiffs to the defendants are, 5800*l*. in respect of the *Minia*, and the two above-mentioned sums of 2000*l*. each in respect of the *Scanderia*. The defendants have received the old materials, valued at 353*l*., out of the *Minia*. No offer of any further sum has been made by the plaintiffs to the defendants. The defendants, at the date when they heard of the loss of the *Scanderia*, had completed 71 per cent. of the whole work contracted for in respect of the *Scanderia*. At that date the price of labour and materials was higher than at the date of the contract."

Upon the above state of facts, it was contended on behalf of the plaintiffs,—first, that the property in the boilers and machinery and other matters prepared by the defendants and ready to be fixed in the *Scanderia* had passed to the plaintiffs. It was admitted that, in general, a contract for the manufacture of articles

to be fitted to a house or a ship would not pass the property upon the mere manufacture of the articles according to the contract: but it was contended that, under the present contract, inasmuch as the boilers were to be inspected by the plaintiffs' inspector, and the defendants were to be paid 2000*l.* upon his certificate that the conditions entitling the defendants to be paid were fulfilled, and the contract itself stated that such payments were to be made "as the work progresses," we ought to hold that, upon each of these instalments being paid and the proper certificates given, so much of the work was irrevocably appropriated to the plaintiffs, and that therefore the plaintiffs were entitled to recover damages for the detention at all events of that portion of the work done when the second instalment of 2000*l.* was paid.

In support of this contention several cases were cited,—especially *Clarke* v. *Spence* (1), *Woods* v. *Russell* (2), and *Wood* v. *Bell.* (3) But, in truth, none of those cases afford material assistance towards the decision of the present case. They were all cases, not of a contract for work and materials to be supplied to a ship by way of repairs or alterations, but contracts for building and supplying a ship; and the question which arose in all those cases was, whether the ship itself or the materials ready to be fitted to it had or had not passed to the purchaser at the time of the bankruptcy of the builder. There was nothing in two of those cases to be done by the purchaser except to pay the price contracted for: and in *Woods* v. *Russell* (2) the property in the ship was held to have passed because the ship-builder signed the certificate to enable the defendant to have the ship registered in his name, and thereby, as the Court thought, consented that the general property in the ship should be considered as from that time being in the defendant.

In the present case there is no such fact, and reliance is wholly placed on the contract between the parties and the payments under it.

In *Clarke* v. *Spence* (1), undoubtedly, the Court treated a provision for the payment for a ship regulated by particular stages of the work as equivalent to an express provision that on payment of

(1) 4 Ad. & E. 448. (2) 5 B. & Ald. 942.
(3) 5 E. & B. 772; 25 L. J. (Q.B.) 148; in error, 6 E. & B. 355; 25 L. J. (Q.B.) 321.

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the first instalment, the general property in so much of the vessel as is then constructed should vest in the purchaser. But that, again, was the case of a contract in which nothing was to be done beyond the supply of a chattel by the one party and the payment at certain stages of its progress by the other. And the case of *Laidler* v. *Burlinson* (1) shews how strictly confined to that simple state of things the doctrine supported by *Clarke* v. *Spence* (2) is held to be.

Wood v. *Bell* (3) turned not upon the contract only, but upon the conduct of the parties. Lord Campbell, indeed, lays very great stress upon the terms of the contract, which made the payments dependent on the vessel's being built to certain specific stages by certain appointed days; and speaks of this provision as "an indication of intention substantially the same as if the days had not been fixed, but the payments made to be due expressly when those stages had been reached." But *Wood* v. *Bell* (3), again, was the case of a contract for the supply of a ship to be built by A. for B., which in our opinion is a very different sort of contract from that with which we have to deal in the present case.

In answer to the plaintiffs' claim for the detention of the goods, the defendants' counsel contended that the contract upon which the question here arises was not a contract for the sale of goods, nor one capable of being so dealt with as regards any part of it. He maintained that it was in substance a contract for work and labour to be done upon two ships belonging to the plaintiffs, and containing provisions wholly inconsistent with the view that the property in any part of the boilers and machinery intended for the *Scanderia* would pass until actually fixed on board the *Scanderia*. He relied strongly on the provision that the old materials were to be received by the defendants under the contract, and upon the several provisions of the specification to the effect that numerous alterations were to be made which could only be decided upon when the ship was in the hands of the defendants, and generally upon the mixed and complicated character of the job contracted for.

(1) 2 M. & W. 602. (2) 4 Ad. & E. 448.
(3) 5 E. & B. 772; 25 L. J. (Q.B.) 148; in error, 6 E. & B. 355; 25 L. J. (Q.B.) 321.

We are of opinion that, upon the true construction of the contract, it was, as contended by the defendants' counsel, substantially a contract for work and labour to be done by the defendants for the plaintiffs, and that, looking to the complicated nature of the work to be done, it is impossible to hold that the provisions as to payment were intended to have the effect of passing the property in each portion of work certified by the inspector as properly done to the plaintiffs as and when his certificate was given. If, indeed, we could see anything upon the face of the contract to shew that the two sums of 2000*l.* were to be considered, as between the parties, to be in payment of the work certified to be done, neither more nor less, we should be disposed to hold that the plaintiffs' contention was well founded; but we do not think that this was the intention of the contract. We think that the two payments of 2000*l.* were intended only to be made as payments on account of the contract to be performed, as a whole; and that they were not intended to appropriate so much money to so much work or materials. The case finds that, at the time at which the defendants were informed of the loss of the *Scanderia*, 71 per cent. of the whole of the work contracted to be done had been completed; and it is difficult to see what more could have been done beyond what would have been included in the first two certificates, until the ship had come into the defendants' hands. Seventy-one per cent. of 5800*l.* amounts to 4118*l.*, a sum materially in excess of the 4000*l.* paid; and we think it can hardly have been in the contemplation of the parties that in any case the defendants should be bound to do a portion of the work contracted for, and hand it over to the plaintiffs for a less than its proportionate value of the whole work to be done; and that, too, without receiving the old materials (worth 353*l.*), which they were to receive in case the contract had been fully performed.

A careful perusal of the specification seems to us to establish that the contract was for one entire job, for which 5800*l.* was to be received on one side and 353*l.* value in old materials on the other. The full performance of this contract having been rendered impossible by the loss of the *Scanderia*, we think that the plaintiffs cannot maintain that any property has passed, and that therefore the claim in detinue fails.

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The second ground upon which the plaintiffs rested was a claim to be repaid the two sums of 2000*l.* paid by them, as money had and received. With regard to the first of these sums, it seems to us to be clear that it was paid in pursuance of the contract, and under such circumstances that the parties could not be placed in statu quo by its repayment. The boilers certified to be plated may have been either of more or less value than 2000*l.*, or of more or less profit or loss relatively to the rest of the subject-matter of the contract. The defendants are guilty of no wrong in not having fitted the boilers in question to the plaintiffs' ship. It seems quite plain that, if the ship had perished during the currency of the bill at four months given for the second 1000*l.* payable upon the plating of these boilers, that would have been no answer, as between the parties, to an action on the bill.

With regard to the second 2000*l.*, there is a still further objection to its recovery in an action for money had and received. Before the plaintiffs paid that sum to the defendants, they were aware of the loss of the *Scanderia;* and the defendants were not aware of it. It cannot, therefore, be maintained that it was paid by the plaintiffs upon a consideration which has since failed; for it was paid with knowledge of the facts, which were unknown to the defendants.

We are therefore of opinion that the plaintiffs have failed to sustain either of the grounds upon which alone they contended that any right of action against the defendants could be supported, and that we are bound to give judgment for the defendants.

Judgment for the defendants.

Attorney for plaintiffs: *G. M. Clements, for Bircham & Co.*
Attorneys for defendants: *Cattarns, Jehu, & Cattarns.*

[REGISTRATION CASES.*]

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Nov. 17.

FOX, APPELLANT; DALBY, RESPONDENT.

Parliament—Borough Vote—Occupation as Tenant under s. 3 *of the Representation of the People Act,* 1867 (30 *&* 31 *Vict. c.* 102).

A sergeant on the permanent staff of the W. Militia, as such occupied a house close to the premises in which the arms, accoutrements, &c., of the corps were stored, which was built expressly for the accommodation of the men employed in looking after the stores, under the provisions of the Militia Act, 1854. The house was assigned to him by the commanding officer as a place to live in; and, if he left it without the permission of his officer, he would be guilty of a breach of discipline for which he would probably be dismissed the service; and he was liable to be turned out at any time. He had 2*s.* 4*d.* per week deducted out of his pay, as occupier of the house; but he would not receive the 2*s.* 4*d.* extra if he resided elsewhere. He could perform the duties required of him equally well if he were living elsewhere, which he might do with his officer's permission:—

Held, that the sergeant did not occupy the premises as tenant, within the meaning of s. 3 of 30 & 31 Vict. c. 102.

Dobson v. *Jones* (5 M. & G. 112), followed.

APPEAL from the decision of the revising barrister for the borough of Devizes.

The appellant objected to the name of Edward Dalby, the respondent, being retained upon the list of persons entitled to vote in respect of his occupation of a house in the parish of Rowde.

The respondent is a sergeant on the permanent staff of the Wiltshire Militia, and as such occupies a house in the Bath Road, Rowde.

This house, with others similar to it, was built, and others were at the same time purchased, by the justices of the county of Wilts, under the provisions of the Militia Law Amendment Act, 1854 (17 & 18 Vict. c. 105). The houses stand in close proximity to the buildings and premises in which the arms, accoutrements, and clothing of the Wiltshire Militia are stored. They are separate houses, containing sufficient accommodation for the families of the sergeants who occupy them; and the wives and families of the sergeants live there with them.

In support of his objection, the appellant referred to s. 2 of the

* For convenience of reference the Registration Cases for this year are collected here irrespective of the term in which they were decided.

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Militia Pay Act (31 & 32 Vict. c. 76), which enacts that, "except when employed as thereinafter provided, every member of the permanent staff of the regular militia, when disembodied, shall reside in such places as shall be sanctioned by the secretary of state for war; and every such member shall forfeit his pay for any period during which he shall be absent, except when employed as thereinafter provided, or when absent by leave of the colonel or commandant of the regiment, battalion, or corps, which leave shall not, except in case of certified sickness, extend beyond three calendar months in one year, nor to a greater proportion than one third of the non-commissioned officers and men at the same time."

Under s. 3 of the Militia Law Amendment Act, 1874 (37 & 38 Vict. c. 29), the above Act has ceased to be of any force as an Act of Parliament; but has the same effect as if Her Majesty had embodied the provisions thereof in a Royal warrant.

The building and quarters, including the houses occupied by the respondent and twenty-three other persons (whose names appeared in a schedule to the case) had been duly sanctioned by the secretary of state for war.

Upon the appointment of the respondent as a sergeant, the house which he occupies was assigned to him by the commanding officer of the regiment. It is an advantage to him to live there, as he could get no other house of equal size for the same rent. He could perform the duties required of him equally well if he were living elsewhere, which he might do by the permission of the commanding officer. One of the sergeants by such permission does live elsewhere, and pursues the avocation of a market gardener, besides fulfilling his military duties.

2*s.* 4*d.* per week is deducted out of the pay of the occupier of each cottage; but, if he resides elsewhere, he does not receive the 2*s.* 4*d.* extra.

Before the new buildings were erected each sergeant was allowed 4*d.* a day lodging money, which has not been allowed since. If any sergeant were billeted elsewhere by reason of there being no house for his use, he would be allowed the sum of 4*d.* per day lodging money.

When appointed by his commanding officer to a particular

house, should he leave that house without asking permission of his commanding officer, it would be a breach of discipline, for which he probably would be dismissed from the service. The commanding officer would have the power of turning any occupier of one of these buildings out. The grates, boilers, and other fixtures in the houses are the property of the county of Wilts. All repairs are done by the county.

The duties of the sergeants are to look to the clothing, arms, accoutrements, and stores required by the militia during the whole year. They are liable to be engaged every day on this duty, if ordered. The sergeants parade at the stores twice a week, and are drilled there. At different times, a sergeant has resided out of these buildings, by leave of the commanding officer.

The sergeant above mentioned as living away from the buildings does not receive any allowance for lodging money. Although he resides away from the stores, he can as an individual perform all the duties required of him.

No sergeant could exchange quarters with another, without the leave of the commanding officer or the adjutant.

The cottages were expressly built adjoining to the stores, for the accommodation of the men employed in looking after them and the safe custody of the stores.

The rate-books for the parish of Rowde were produced; and therein the name of the respondent Edward Dalby appears as the occupier of the house, and the county of Wilts as the owner, but the later columns are left blank, no assessment having been made on the premises; and no rate has ever been paid (because never asked for), either by the respondent as occupier, or by the county as owner, in respect of the premises.

It was thereupon contended, on behalf of the appellant, that the respondent did not occupy as owner or tenant within the meaning of 2 Wm. 4, c. 45, s. 27, or the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 3, and that if he did so occupy, he ought to have been rated and to have paid rates in respect of the premises.

The revising barrister decided: First, that the respondent did occupy as tenant within the meaning of the statute. Secondly, that the premises he so occupied being exempted from the pay-

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ment of rates (as they are under the Militia Act of 1854 (17 & 18 Vict. c. 105, by which it is specially enacted (s. 2) that no place provided for the purpose of keeping militia stores, nor any buildings or premises appurtenant thereto, shall be liable to be assessed to any county, borough, parochial, or other rates or assessments), the respondent was, although not rated, entitled to be on the list.

If the decision of the Court be against retaining the name of the respondent and those of twenty-three other persons whose cases were consolidated with the principal case, the register was to be amended by erasing them.

Sir Henry James, Q.C. (*Charles* with him), for the appellant. The question turns upon s. 3 of 30 & 31 Vict. c. 102, which, to entitle a man to the occupation franchise, requires that he shall for a given period have occupied "as owner or tenant," a dwelling-house within the borough and shall have been rated and paid certain rates in respect of such premises. The claimant here did not occupy as tenant, neither was he rated. The premises in which he resided were assigned to him by his commanding officer; and he was liable at any moment to be ordered elsewhere,—his occupation being entirely subservient to his employment. The two principal authorities upon the point are, *Hughes* v. *Overseers of Chatham* (1) and *Dobson* v. *Jones*. (2) In the former case an officer who was allowed to occupy a house in the dockyard, in respect of which he was rated, was held to occupy as tenant, although he paid no rent in money for it, but had it as part remuneration for his services; and in the latter case the surgeon of Greenwich Hospital, who occupied a house at the infirmary in the hospital, was held not to occupy the house "as tenant," inasmuch as he was required to occupy the same with a view to the more efficient performance of his duties as surgeon: and in the judgment of the Court delivered by Tindal, C.J. (3), the distinction is pointed out between the person being required or only permitted to occupy the house; in the latter case he is tenant, in the former he is not. The voter here, as in *Dobson* v. *Jones* (2), clearly falls within the latter description, as being required to occupy the house

(1) 5 M. & G. 54. (2) 5 M. & G. 112.
(3) 5 M. & G., at p. 120.

allotted to him for the proper and efficient discharge of his duties. The circumstance of the deduction of 4*d.* per week from the voter's pay, in consideration of the accommodation of the cottage, makes no difference. "The fact of having a lower salary in consequence of being allowed a house," says Tindal, C.J., in *Hughes* v. *Overseers of Chatham* (1), "though not immaterial, is by no means decisive; for, such a fact might exist in a case in which the house was occupied for the purpose of the service, and not in the character of tenant." In *Clark* v. *Overseers of Bury St. Edmunds* (2), the keeper of the Guildhall at Bury St. Edmunds had a house assigned to him by the corporation, in which he was required to reside, and it was necessary for the due performance of his duty that he should reside therein; and it was held that his occupation was that of servant and not of tenant. As to the question of rating, the case involves some difficulty. The premises were not assessed, and probably were not assessable, by reason of the exemption in 17 & 18 Vict. c. 105, s. 2.

Lopes, Q.C., for the respondent, was directed by the Court to confine his argument to the first point. The revising barrister having decided that the claimant occupied the premises in question as tenant, the Court will not, if there were any materials before him to justify his decision, interfere with it. It is found that the voter could perform the duties required of him equally well if he were living elsewhere than in the house assigned to him, which he might do by the permission of the commanding officer; and it is found that another sergeant did in fact reside elsewhere. The case falls within the principle of *Hughes* v. *Overseers of Chatham* (3), and not within that of *Dobson* v. *Jones.* (4) The true test is that given by Tindal, C.J., in the first case (5): "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; and if he do so, the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration. But it may

(1) 5 M. & G. at p. 79.
(2) 1 C. B. (N.S.) 23; 26 L. J. (C P.) 12.
(3) 5 M. & G. 54.
(4) 5 M. & G. 112.
(5) 5 M. & G., at p. 78.

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be that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them; it may be that he is not *permitted* to occupy, as a reward, in the performance of his master's contract to pay him, but *required* to occupy in the performance of his contract to serve his master." Applying that principle here, the voter is placed in the house in question (for which he pays a quasi rent of 2*s.* 4*d.* per week) for the more convenient performance of his duties, it may be; but he may by permission reside elsewhere.

[DENMAN, J. The case finds that "the cottages were built adjoining to the stores, for the accommodation of the men employed in looking after them and the safe custody of the stores." The very object, therefore, of placing the voter in the house in question was the performance of his duty.]

It is not found that his residence there was necessary for the performance of his duties; on the contrary, the very reverse is to be inferred from the general statement of the case.

[LORD COLERIDGE, C.J. The sergeant is required to reside in a place sanctioned by his commanding officer; if he removes without leave, he is liable to be dismissed the service. How can we infer that he occupies as tenant?

BRETT, J. If the person is required to reside with a view to the more efficient performance of his duties, he is not tenant, or if his residence is necessary for the performance of his duties, he is not tenant.]

The question is whether there was evidence to warrant the revising barrister in finding that he was tenant.

[LORD COLERIDGE, C.J. In *Hughes* v. *Overseers of Chatham* (1) it was suggested by Mr. Cockburn in argument that "it is perhaps rather a question of fact than of law;" but Tindal, C.J., said: "Or if the question is whether, under a given state of facts, the legal relation of landlord and tenant exists, that is surely a point of law."]

LORD COLERIDGE, C.J. I am of opinion that the decision of the revising barrister in this case was wrong, and must be reversed. The respondent is a sergeant on the permanent staff of the Wiltshire militia, and as such occupies a house which stands in close

(1) 5 M. & G., at p. 63.

proximity to the premises in which the arms, accoutrements, and clothing of the Wiltshire militia are stored, and was expressly built adjoining to the stores for the accommodation of the men employed in looking after them and their safe custody. It is no doubt possible for a person so occupying to occupy as tenant. But, what does the case find? It finds that the house was built under the provisions of the Militia Law Amendment Act, 1854. It further finds that, upon the respondent's appointment as a sergeant, the house was assigned to him by the commanding officer as a place to live in; that, if he should leave that house without asking permission of his commanding officer, it would be a breach of discipline for which he would probably be dismissed the service; and that the commanding officer had the power of turning him out at any time. We are asked under these circumstances to affirm this to be in law an occupation as tenant. It seems to me that no one incident of a tenancy is stated in the case. It is unnecessary for us to affirm what was the nature of the respondent's occupation. It is enough to say that he does not occupy either as owner or as tenant, and that his occupation is not such as to entitle him to a vote under 30 & 31 Vict. c. 102, s. 3.

The matter, however, does not come before us without authority. There are two leading and governing cases upon the subject, both decided by the same judges, and well known to every one having any legal experience as the *Chatham Case* (1) and the *Greenwich Case*. (2) The judgments in those two cases have always been considered as containing the true test upon the question now before us. It is true they were decided before the Act of 1867; but substantially the words upon which the decisions turned are the same. In the first of those cases, the master rope-maker at Chatham Dock-yard had a house for his residence in the yard rent-free as part remuneration for his services, of which he had the exclusive occupation. If he had not had that house, he would have had an allowance in lieu of it in addition to his salary. The Court held that he occupied as tenant. In the later case, the surgeon of Greenwich Hospital occupied as such a house in the infirmary in the hospital, which was appropriated to the surgeon, and in which by the regulations of the hospital he was

(1) 5 M. & G. 54. (2) 5 M. & G. 112.

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required to reside. The Court (consisting of the same judges, viz. Tindal, C.J., and Coltman, Erskine, and Maule, JJ.), held that the surgeon did not occupy as tenant. The latter is the more important decision, inasmuch as the Chief Justice, in delivering the judgment of the Court, distinguishes the circumstances of the two cases, and states the principle upon which the decision in the former case proceeded. "In delivering our opinion upon a former case," he says (1), "we laid down at some length the principle upon which we thought the class of cases to which the present appeal belongs ought to be decided; and we drew the distinction between those cases where officers or servants in the employment of government are *permitted* to occupy a house belonging to the government, as part remuneration for the services to be performed, and those in which the places of residence are selected by the government, and the officers or servants are *required* to occupy them, with a view to the more efficient performance of the duties or services imposed upon them. Upon that occasion, we declared our opinion to be that those officers or servants who fell within the first description might properly be considered to occupy as tenants, although the residence was allotted to them as such officers and servants, and although they might, if such residence had not been allowed to them, have had an additional allowance for lodging money; whilst, at the same time, we stated that the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made with a view, not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the service required from such officer or servant." He then instances the cases of the coachman who is placed in rooms over the stable, the gardener who occupies a house in the garden, and the porter who occupies the lodge at a park gate. Now, it is important to see what were the facts which induced the Court to hold in *Dobson* v. *Jones* (2) that the case of the surgeon fell within the latter category and was excluded from the former. They are thus stated by the Chief Justice (3): "It is found by the case that the appellant is the

(1) 5 M. & G., at p. 120. (2) 5 M. & G. 112.
(3) 5 M. & G. at p. 121.

surgeon of Greenwich Hospital; that the house which he occupies is in the infirmary; that he occupies it as such surgeon. Now, the nature of the office of surgeon to the hospital is such that a residence in some known and certain dwelling may reasonably be required for the due performance of the duties of his office. But it is further found that he was placed in it when he was first appointed (nineteen years ago), and that he has continued to occupy it ever since, and that it is the house appropriated to the surgeon for the time being. And, lastly, it is found by the revising barrister that, by the regulations established by the Lords Commissioners of the Admiralty, the officers of the hospital having apartments are to inhabit those assigned to them, and that no exchanges or other appropriations are to be made without permission." These are the circumstances stated in the considered judgment of the Court which were held to bring the claimant in that case within the class of officers who, being "required to occupy a selected place of residence with a view to the more efficient performance of the duties or services upon them," are not occupiers "as tenants." What are the facts here? The place of residence of the voter was selected by the government. He was not permitted but required to occupy the allotted residence for the more efficient performance of his duties. He could not leave it without the permission of his commanding officer, on pain of dismissal from the service. And the commanding officer had power to turn him out at a moment's notice. I am utterly unable to discover one single fact in this case to distinguish it from that of *Dobson* v. *Jones*. (1) It has been suggested by Mr. Lopes that the revising barrister has found as a fact that this sergeant "could perform the duties required of him equally well if he were living elsewhere, which he might do by the permission of the commanding officer." In *Dobson* v. *Jones* (1) it was not found to be essential that the surgeon should reside in the hospital; and by the Order in Council referred to in the case, "surgeons of hospitals, when not provided with a residence within the hospital, are to be allowed 15*s*. a week lodging money." Upon the authority of that case alone I should be prepared to hold that Mr. Lopes' contention is not well founded. But it is better perhaps to say, and I am quite prepared to say, that this is not the

(1) 5 M. & G. 112.

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essence of the distinction between the two cases which I have referred to. As is well pointed out by Cresswell, J., and Crowder, J., in *Clark* v. *Overseers of Bury St. Edmunds* (1), if either ingredient exists,—if the occupation be necessary for the better performance of the duties required to be performed by the party, or if, though it be not necessary for their performance, he is required by the authority by which he is appointed to reside there in order to perform them,—the occupation is not an occupation as tenant. It appears that the voter here is ordered by his commanding officer to reside in the house in question in order to perform the duties which are imposed upon him; and it is manifest that it is a convenient thing that he should reside near to the stores which he has to look after. Whether, therefore, upon principle or upon the authority of the three cases I have referred to, all of which are binding authorities on us, and all more or less in point, I am of opinion that the occupation in this case has no one of the incidents of an occupation either as owner or as tenant.

The second point was not argued. I therefore give no opinion upon it.

Brett, J. In this case the revising barrister has found certain facts absolutely. He has then found a mixed question of law and fact, subject to the opinion of this Court as to whether his conclusion was right or wrong. If we should be of opinion that he was wrong, then it is our duty to overrule his decision: if we should think the matter doubtful, then we ought to leave his decision untouched. The question arises upon s. 3 of 30 & 31 Vict. c. 102, but it might equally well have come under s. 27 of 2 Wm. 4, c. 45; and it can only arise where the claimant has duties or services to perform or to render as incidental to his occupation of the premises, and where his occupation is required for their performance. The principle by which the Court has been guided in dealing with this question is fully stated in *Hughes* v. *Overseers of Chatham* (2), as explained and enforced in *Dobson* v. *Jones* (3), and further illustrated by the case of *Clark* v. *Overseers of Bury St. Edmunds.* (1) The result of those three cases

(1) 1 C. B. (N.S.) 23, 31; 26 L. J. (C.P.) 12.
(2) 5 M. & G. 54.
(3) 5 M. & G. 112.

seems to be this, that, where a person situate like the respondent is permitted (allowed if so minded) to occupy premises by way of reward for his services, or as part payment, his occupation is that of tenant; but that, where he is required to occupy them for the better performance of his duties, though his residence there is not necessary for that purpose, or, if his residence there be necessary for the performance of his duties, though not specifically required, his occupation is not that of tenant. The question is, under which head the voter is brought in this case. Upon the facts as found by the revising barrister I gather that this man was not permitted (allowed if so minded) to occupy the house allotted to him for a residence; but that, by the authority of the Queen, persons circumstanced like the voter are directed to occupy certain houses, and they are required to occupy them, to this extent, that they cannot occupy any other without the leave of the commanding officer; if they do, they are liable to be dismissed the service. Upon the finding of the revising barrister upon which Mr. Lopes relied, I think we may assume that it was not absolutely necessary for the performance of the duties cast upon them that these persons should reside in the houses allotted to them, if they are not required by the superior authority to do so. But it appears that the voter was required by his commanding officer to reside in the particular house in order to the better performance of his duties. Therefore, according to the principle laid down in the cases referred to, he did not occupy as tenant. Being satisfied of this, I think we are bound to overrule the decision of the revising barrister. I agree with my Lord that the decision must be reversed.

Denman, J. I am of the same opinion. At the end of a long statement of the facts upon which he bases his decision, the revising barrister states that he decided that Dalby did occupy as tenant within the meaning of the statute. He, therefore, decided a mixed question of law and fact, and left it to the Court to say whether he had decided rightly or wrongly. And at the end of the case he says, should the decision of the Court be against retaining the name of Dalby upon the register of voters for the borough, the register is to be amended by erasing it therefrom.

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Obviously, therefore, he intended to leave it to the Court to say whether or not the voter, upon the facts disclosed in the case, did in point of law occupy as tenant. The case of *Dobson* v. *Jones* (1) is to the full extent an authority for holding that the voter did not occupy as tenant. The only part of the case upon which any doubt could arise is the statement, that the voter could perform the duties required of him equally well if he were living elsewhere, which he might do by the permission of the commanding officer. It appears to me, however, that that is an immaterial finding. The rest of the statements in the case plainly shew that he was required to occupy the house in question with a view to the more efficient performance of the duties or services imposed upon him; and that he had not the permission of his commanding officer to reside elsewhere. He had, therefore, no option. He was in the compulsory occupation of the premises for the purpose of performing his duties as a sergeant on the permanent staff of the militia. He did not occupy as tenant, and did not acquire a vote in respect of such occupation as he had. I am, therefore, of opinion with the rest of the Court that the decision of the revising barrister must be reversed.

Decision reversed.

Attorneys for appellant: *Bower & Cotton, for Jones & Forester, Malmesbury.*

Attorney for respondent: *W. A. Willoughby, for Hulbert & Son, Devizes.*

(1) 5 M. & G. 112.

LEWIS, APPELLANT; EVANS, RESPONDENT. 1874

Parliament—County Vote—Notice of Objection sent by Post—Proof of Service. *Nov. 17.*
6 *Vict. c.* 18, *s.* 100.

The place of abode of a county voter as described in the list of voters was W. To prove service of a notice of objection the duplicate addressed to the voter at W. was produced, and it was proved that the notice had been posted in time to reach E., which is the nearest post-town to W., on the morning of the 19th of August, by the ordinary course of post; but W. was two miles distant from E., and there was no delivery of letters at W., and, unless by some private accidental conveyance, the voter would not receive the notice:—

Held, that the above was no evidence, under 6 Vict. c. 18, s. 100, of the notice having been given to the voter at W., in the ordinary course of post, on or before the 20th of August.

APPEAL from the decision of the revising barrister for the county of Pembroke.

Thomas Lewis objected to the name of Evan Evans (who did not appear to support his vote) on the list of voters for the parish of Llangolman.

The place of abode of Evan Evans as described in the list of voters was "Wern," which was in the parish of Llangolman.

The stamped duplicate of the notice of objection was produced before the revising barrister by the person who posted it. It was directed: "To Mr. Evan Evans, Wern." Evidence was given, and it was to be taken as a fact, that the notice, in the ordinary course of post, would reach the post-office at a place called Efarlwen (which is the nearest post-office to Wern) on the 19th of August last at ten o'clock in the morning. Wern is two miles from Efarlwen, and there is no delivery by post at Wern; and, unless by some private accidental conveyance, Evan Evans would not receive the notice. No other evidence was given as to service of the notice.

The revising barrister held that there was no evidence, within s. 100 of 6 Vict. c. 18, that the notice had ever been given to Evan Evans at Wern; and he retained the name on the list.

The question for the opinion of the Court was whether there was any evidence, under s. 100, of the notice having been given

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to Evan Evans at Wern on or before the 20th of August, in the ordinary course of post.

Grantham, for the appellant. The 6 Vict. c. 18, s. 100, enacts that it shall be sufficient, in every case of notice to any person objected to in any list of voters, if the notice be sent by the post, free of postage, directed to the person to whom the same shall be sent, at his place of abode as described in the list. Having done that, the objector has done all that the Act requires of him; and the production of the stamped duplicate "shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would *in the ordinary course of post* have been delivered at such place." Here, the notice was posted in time for it to reach the post-town nearest to the residence of the person objected to within the prescribed time, in ordinary course of post; and, if there had been a delivery by post there, it would have arrived at his place of abode in due time. Owing, however to the faulty arrangements of the post-office, the notice would not go further than the post-town. In *Bishop* v. *Helps* (1), the notice was posted in sufficient time to reach the voter, according to the ordinary course of post, on the 25th of August; but, in consequence of an accidental and unaccounted-for delay in its transmission, the actual delivery did not take place until the 27th: and the service was held sufficient. In giving judgment, Tindal, C.J., after referring to the terms of the section, says (2): "It is, therefore, evident that some privilege is meant to be conferred by s. 100 on a mode of dealing with the notice which is so carefully provided for. The notice must be posted at a select description of office; within certain hours; the postage must be paid; it must be registered, and the fee for registration must be paid; it must be delivered to the postmaster open, and in duplicate; compared; stamped; and the duplicate returned. And we think the meaning of the Act is this,—when all these conditions are complied with, such a sending shall be a sufficient substitute for what the 7th section required to be done, that is, a sufficient substitute for giving the notice to the person objected to, or leaving it at his place of abode."

(1) 2 C. B. 45; 15 L. J. (C.P.) 43. (2) 2 C. B., at p. 56.

[BRETT, J. Having chosen to adopt the mode of service given by s. 100, the objector is bound to take care to bring himself within the section. Does he do this by merely shewing that he posted the notice in time for its delivery at Efarlwen on the 19th of August?]

That was in abundant time for the notice to have reached the voter by the 20th, if there had been a regular delivery at Wern. The objector could do no more than he has done.

The respondent did not appear.

BRETT, J. Upon the facts stated in this case, the objector seems to have fulfilled all the conditions required of him by s. 100 of 6 Vict. c. 18. But, do the facts proved amount to the evidence which the statute requires, viz. "evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered at such place?" The question is, on what day would this notice have reached the objector at Wern in the ordinary course of post? There is no delivery at Wern; and there is no evidence that any one goes to the post-town to receive letters for Wern. All that the revising barrister finds is, that, "unless by some private accidental conveyance, Evan Evans would not receive the notice." I think he has stated the appellant out of court.

DENMAN, J., concurred.

Decision affirmed.

Attorneys for appellant: *Prior, Bigg, Church, & Adams.*

END OF REGISTRATION CASES.

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Feb. 25.

JEBSEN AND OTHERS *v.* EAST AND WEST INDIA DOCK COMPANY.

Damages, Measure of—Joint Contractors—Set-off—Recoupment of some of several Persons jointly contracted with.

PD. 460

In an action for breach of a contract for the quick discharge of a ship made with several persons jointly, where some of the plaintiffs had made profits by reason of such breach of contract which they would not otherwise have made, through another ship in which they were interested having been substituted for the purpose for which the former ship was required:—

Held, that the amount of the joint damages could not be reduced by the profits so made by some of the plaintiffs individually.

ACTION for breach of a contract to discharge a ship of the plaintiffs' in the defendants' docks without delay, whereby the plaintiffs lost the use of the ship for a long time, and lost the passage-money payable by certain emigrants, and had to pay large sums of money for the support of the said emigrants. (1)

The facts as proved at the trial, and the grounds on which leave was reserved to move to reduce the damages found for the plaintiffs, sufficiently appear from the judgment.

A rule nisi having been obtained in pursuance of the leave reserved,

Thesiger, Q.C., and *Webster*, shewed cause. It is contended by the defendants that, in ascertaining the damages, the fact that some of the plaintiffs were recouped by reason of the gains made by another ship in which they were interested must be taken into account. It is submitted that there is no authority for such a mode of estimating the damages in the case of joint contractors. If the plaintiffs instead of being joint contractors, had been a corporation, it is quite clear that the fact of some of the individual members of the corporation having been recouped in the same way could not be taken into account in estimating the damages. The case of partners is so far analogous to that of a corporation, that it is the body of partners as a single legal entity that is entitled to the damages,

(1) It is not necessary to set out the pleadings in detail, inasmuch as the only question was as to the amount of the damages for the breach of the contract.

not the different individual partners. In contemplation of law the party recouped is not the same as the party damaged.

The excessive complication that the admission of such a principle as that contended for by the defendants would produce is a sufficient reason against it. It would be impossible to set reasonable limits to its application, and it might lead in many cases to collateral inquiries of which it is difficult to see the end.

This is substantially an attempt to set off several profits against a joint damage.

[They cited *Yates* v. *Whyte* (1), and *Bradburn* v. *Great Western Ry. Co.* (2)]

Watkin Williams, Q.C., and *C. S. C. Bowen*, supported the rule. Some of the plaintiffs have been recouped the damages that they sustained by the breach of contract by the gains that accrued to them through the carriage of the emigrants by another ship in which they were interested. It may be admitted that the plaintiffs are entitled to their damages as a single legal entity, but the question is to what amount of damages are they so entitled? The amount of damage which the plaintiffs are collectively entitled to recover is the aggregate of the damages which each has sustained individually. The case of *Yates* v. *Whyte* (1) is not in point, because it is clear in such a case the underwriters would be entitled to the damages recovered. If the principle of *Bradburn* v. *Great Western Ry. Co.* (2) were applied to the present case, it would go too far, because it would go the length of shewing that if there had only been one contractor, and he had been recouped all his damages, that circumstance could not be taken into account.

Suppose, in such a case as the present, A. owned one sixty-fourth of the one ship and B. sixty-three sixty-fourths, and B. owned the whole of the other ship, could it be said that the fact of A. owning one sixty-fourth let in all the damages which B. could not have recovered if he had been sole owner of both ships? It is a fallacy to say that a partnership is analogous to a corporation in this respect. A partnership is simply an aggregate of individuals, and to ascertain the loss of a partnership you must ascertain the loss to each individual. The English law only knows of two sorts of

(1) 4 Bing. (N.C.) 272. (2) Law Rep. 10 Ex. 1.

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persons, individuals and corporations. It is true that the interest of the individual members of a partnership is joint; they can only sue or be sued jointly. The interest which they have in the damages when recovered is joint, and a Court of law cannot go into the question how far each is interested in the joint damages. But the only mode of ascertaining the joint damages is by ascertaining the amount to which each has been damaged. The greatest injustice and absurdity must follow from any other mode of assessment. Suppose two persons are jointly interested in two carriages which carry a certain number of passengers, and in consequence of a breach of contract to repair these carriages, they cannot carry certain passengers in them; but suppose they are each severally interested in two other carriages which will carry the same number of passengers each, and the consequence of the breach of contract is that the same number of passengers are conveyed in the second pair of carriages. If the owners of the carriages can jointly recover the whole damages, without regard to what they were recouped in their separate capacities, each will really get twice as much as if the contract had not been broken.

Suppose, again, a gang of labourers, jointly contracting to do a piece of work, wrongfully dismissed: each goes and separately procures work which brings him in as much as the job he has lost. Could it be suggested that the whole gang suing jointly could recover the aggregate sum to be paid to the whole, without taking into account in reduction of damages the amount each was recouped by the employment he procured in substitution for that which he had lost as a member of the gang?

Considerations derived from the law of set-off do not apply, inasmuch as they depend on the words of the statutes relating to set-off.

Cur. adv. vult.

Feb. 25. The judgment of the Court (Lord Coleridge, C.J., and Grove, and Denman, JJ.) (1), was read by

DENMAN, J. This was an action tried before me at the sittings at Guildhall after Easter Term, 1874, to recover damages for the

(1) Keating, J., who had heard the argument, retired at the end of Hilary Term, but is understood to have concurred in the decision arrived at.

detention of a steamer of the plaintiffs, called the *Peter Jebsen*, by the default of the defendants. The verdict was for the plaintiffs, and it is not disputed that for some amount the verdict must stand.

By the limitation placed by the Court upon the rule on which we are now to give judgment, the questions became reduced to the single one whether the plaintiffs were entitled to retain a sum of 1444*l.* 14*s.* 6*d.* which was assessed by the jury, or such portion of that sum as an arbitrator might award, if the Court should be of opinion that they were entitled in point of law to retain any of it. This point was elaborately argued before us last term; and we are now to give judgment upon it.

The question arose thus:—There were two lines of steamers from Norway to America called respectively the Nordske Lloyd's and the Nordske American lines. The *Peter Jebsen* belonged to the Nordske Lloyd's. She was under contract to carry a cargo of emigrants and merchandise from Bergen to New York at the time when she was detained in the defendants' dock, and in order to fulfil her contract she ought to have been at Bergen at the end of June or the beginning of July, 1872, so as to start from Bergen, as she had been advertised to do, on the 4th of July. Sufficient notice of this contract had been given to the defendants to make them liable for the loss occasioned to the plaintiffs by the breach of it, if, as was the fact, the defendants' conduct caused that breach: and this loss is to be taken, for the purpose of our judgment, at 1444*l.* 14*s.* 6*d.*

It is said, however, that the plaintiffs have not sustained these damages in fact, and that therefore in law they are not entitled to retain them. The *Peter Jebsen*, as has been said, belonged to the Nordske Lloyd's line. There were two other steamers, the *Harold Harfager* and the *S. Olaf*, which belonged to the Nordske American line. The 240 emigrants who were booked for America by the *Peter Jebsen* were indeed lost to her. But 202 of them went to America on the 10th of July by the *Harold Harfager;* and 25 more of them went to America on the 16th of August by the *S. Olaf*. It is as to these that the substantial question arises.

The two lines of ships which have been mentioned are associa-

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tions of ships and not of owners. There is one body of directors and one set of laws for each of the lines respectively. But the owners in each ship in each line are not the same. Each ship has its own set of owners; and the same man may be and in fact is part owner in various proportions of different ships in different lines. In the instances of these particular ships, the facts were thus:—The *Peter Jebsen* was divided into 192 shares, and the twelve plaintiffs owned them. The *Harold Harfager* was divided into 360 shares, which were owned by 33 owners; and 5 of these 33 were five of the plaintiffs. The *S. Olaf* was divided into 300 shares, which were owned by 26 owners, and 5 of these 26 were five of the plaintiffs, but not all the same five as were part-owners in the *Ha old Harfager.*

Now, it is said the *Harold Harfager* and the *S. Olaf* profited by the loss of the *Peter Jebsen;* they carried emigrants whom they would not have carried but for the detention of the *Peter Jebsen;* some of the plaintiffs, therefore, gained by the default of the defendants; and such gain to individual plaintiffs, which, though with difficulty, is yet capable of being ascertained, must therefore be taken in reduction of the damages which the whole body of plaintiffs is entitled to.

The statement of such a proposition in its bare simplicity is perhaps a sufficient answer to it. We need not insist upon the difficult and complicated inquiries which in a multitude of easily suggested cases (some were suggested in the ingenious argument before us) would render any result being arrived at by a jury practically impossible.

The absence of authority for a claim by defendants like this, which yet if well founded must have arisen in many cases, affords a strong presumption against its having any legal foundation. It is true that there must be a first instance in every claim, and that ingenuity often for the first time suggests a point which has escaped observation, and which yet, when brought to the test of argument, is found to be a sound one. But this is a point which must have arisen so frequently that it is to us incredible that, if sound, it never should have been taken.

The contention of the defendants, however, is not only without authority; it is against the principle of cases decided under

analogous circumstances. It should seem that, if there had been but one owner of the *Peter Jebsen*, and the same person had been sole owner of the *Harold Harfager* and of the *S. Olaf*, the profits made by him as owner of the two latter could not be deducted from the damages sustained by him as owner of the former. *Yates* v. *Whyte* (1) decided that a defendant in a collision case could not deduct from the amount of damages to be paid by him a sum of money paid to the plaintiff by insurers in respect of such damage. It may be said that the authority of this case is not direct, because the insurance was a contract of indemnity, and the insurers might have recovered over from the plaintiff. The decision in the case, however, and in that of *Mason* v. *Sainsbury* (2),—itself cited with approbation in *Yates* v. *Whyte* (1),—both stand on grounds independent of this consideration. But, whatever weight may be due to this consideration, the case of *Bradburn* v. *Great Western Ry. Co.* (3) cannot be so qualified. That was an action for injuries in a railway accident: it was held that, in estimating the damages, the defendants could not take into account the amount which the plaintiff received from an accidental insurance policy. There, the contract was not one of indemnity. The judges held that the contract into which the plaintiff had entered was that, in consideration of the payment of premiums, he (the plaintiff) should, on the happening of a certain event, receive a sum of money. The event happened, and the benefit of the contract accrued to the plaintiff through the defendants' default. But the benefit could not be deducted from the damages for which the defendants were liable. This case appears to us to be perfectly well decided, and to be in point against the defendants in the case before us.

Furthermore, although not in form, it is in substance an attempt to set off against joint damage a several benefit.

We were told by Mr. Bowen, in a very able argument, that he relied upon a distinction, which no doubt exists, but which we think will not avail the defendants, between partnerships and corporations. For the purposes of actions for breach of contract, part-owners of ships, who are working the ship together for profit, are in the same position as partners; and, where partnerships

(1) 4 Bing. N. C. 272. (2) 3 Doug. 61.
(3) Law Rep. 10 Ex. 1.

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sue for breach of contract, the damages must be confined to those sustained by the partnership; the joint damage only can be considered. It seems to follow that any benefit arising out of the breach of contract, assuming that it can be taken at all into account in reduction of damages, must be a joint benefit, or one accruing to the partnership. In such a case as that put in argument, of a gang with whom a joint contract had been made being dismissed in breach of it, it is clear enough that the gang can sue. It was held, in the case of The Tonbridge Wells dippers, *Weller* v. *Baker* (1), by Lord Chief Justice Wilmot and the Court of Common Pleas (2), that, if a stranger disturbed them in their employment, they were all jointly concerned in point of interest, and could all jointly sue in an action on the case. It follows that only something in which the benefit was joint could, if anything could, be considered in reduction of damage. If the matter now attempted to be set off in substance were a set-off in form, there would be no room for the defendants' contention; for, a joint debt cannot be set off against a separate demand, nor a separate debt against a joint one. The benefit here, as it is a gain from third parties, is not a set-off; but the same rules of sense and convenience apply as if it were.

On no ground, therefore, do we think the defendants entitled to succeed; and the rule must be discharged.

Rule discharged.

Attorneys for plaintiffs: *Lowless & Co.*

Attorneys for defendants: *Freshfields & Williams.*

(1) 2 Wils. 414. (2) See fourth point of the judgment, 2 Wils. p. 423.

CARR *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

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Jan. 20.

Railway Company—Common Carriers—Negligence—Estoppel.

The plaintiff bought goods which were to be consigned to him at Liverpool from St. Helen's by the defendants' railway. On the 7th of July, 1873, the plaintiff received advice-notes from the defendants informing him that *three* parcels of goods had been received by them for his account, and that they held them subject to his order and to the payment of rent and charges. The plaintiff immediately instructed his broker to sell the whole. Early in August the plaintiff received invoices of the three parcels from his vendors, and paid for the whole by an acceptance which was duly honoured. The goods were sold on the 21st of August, and the rent and charges on the *three* parcels were paid to the defendants by the broker: but it turned out that *two* parcels only had been delivered to the defendants (the third still remaining on the premises of the vendors), and the plaintiff was obliged to pay to his vendees 5*l.* 4*s.* 1*d.*, the difference between the price at which they had bought the third parcel and what they had to pay for other goods. The defendants' servants were aware on the 9th of July that they had never received the third parcel, but no notice of the mistake was given to the plaintiff until the 1st of September, after the goods had been re-sold and the charges paid:—

Held, in a special action for non-delivery of the third parcel, with a count in trover, that the defendants were not estopped from shewing that the goods had never reached their hands; and consequently could neither be liable in trover nor for breach of contract in not delivering the goods.

Ordinary definitions of an estoppel in pais.

THE first count of the declaration was for non-delivery of fifteen casks of bleaching-powder, marked B. Nos. 16 to 30, which had been intrusted to the defendants by the plaintiff. The second count was trover for the goods in the first count mentioned: and there were the common money counts.

The defendants pleaded not guilty, a denial of the breaches alleged, except as to 1*l.* 10*s.* 0½*d.*, never indebted, and as to that sum payment into Court. Issue thereon.

The cause was tried before the assessor of the Court of Passage at Liverpool on the 2nd of July last. The facts are fully set out in the written judgment of the Court.

On the part of the plaintiff it was submitted that, having informed the plaintiff that they had received the goods for his account, and having been paid by him the warehouse-rent and charges on them, and having thus induced the plaintiff to make

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a contract for the sale of them upon the faith of their representation that the whole of the goods were in their warehouse at his disposal, the defendants were estopped from saying that they had not received them, and consequently were liable in trover for their value; or, at all events, that they were bound to indemnify the plaintiff for the loss he had sustained in having to buy other goods in order to perform his contract with his vendees.

For the defendants it was submitted that, inasmuch as the casks B. 16 to 30 had never reached their hands, they could not be liable in trover for them; and that there was nothing to go to the jury, there being no damages which could in any sense be said to be the natural or reasonable result of any breach of contract by the defendants.

The learned assessor left it to the jury to say whether and to what amount the plaintiff had been damnified by the defendants' negligence. The jury found for the plaintiff for the full amount claimed, viz. 62*l.* 19*s.* 9*d.* and interest from the time the bill was due; and also 5*l.* 4*s.* 1*d.*, the amount of loss the plaintiff had sustained on the purchase of other goods by his vendees. And, in answer to a question put to them at the request of the plaintiff's counsel, they further found that the defendants knew of the mistake on the 9th of July, and that there was no sufficient intimation of it by them to the plaintiff.

A verdict was thereupon entered for the defendants, with leave to the plaintiff to move this Court to enter a verdict for the plaintiff for 70*l.* or such other sum as the Court should order, if they should be of opinion, on the present or any amended state of the pleadings, that the plaintiff was entitled to recover.

Nov. 4. *Gully* obtained a rule nisi accordingly. He proposed to add the following amended or additional count:—

"That the defendants were carriers of goods to Liverpool, and warehousemen at Liverpool, and the defendants gave notice to the plaintiff that certain goods of the plaintiff had been consigned to the plaintiff at Liverpool; and thereupon, in consideration that the plaintiff would promise to pay to the defendants rent or warehouse charges in respect of the goods described in such notice from the date of the said notice until such time as the plaintiff

should require the defendants to deliver the same to him or to his order, the defendants promised and warranted to the plaintiff that the said goods had been received by them, and were then in their possession, and that they would, upon request, and upon payment of such charges as aforesaid, deliver the same to the plaintiff or to his order: and all things happened and all times elapsed and all conditions were fulfilled necessary to entitle the plaintiff to a performance by the defendants of their said promise, and to bring this suit for the breaches hereinafter mentioned; yet the defendants had not then received, and had not then in their possession, the said goods; and the defendants further broke their said agreement in this, that they did not deliver the said goods to the plaintiff, although they were requested so to do and the said charges were paid; and by reason of the premises the plaintiff lost the said goods and the value thereof, and incurred loss and expense in procuring other goods in place thereof."

Nov. 25. *Graham* and *French* shewed cause. There was no evidence of a conversion, inasmuch as it was admitted that the goods in question never reached the hands of the company at all: and, notwithstanding the finding of the jury that the company did not give sufficient intimation of their mistake to the plaintiff, they were not estopped from shewing the truth. The advice-note was not such a representation as the plaintiff was entitled to act upon as he did. His position was in no respect altered or prejudiced by it: the goods are still in the possession of his vendors, and he may have them whenever he chooses. The case does not fall within any of the illustrations of estoppels in pais given by Parke, B., in *Freeman* v. *Cooke*. (1) The representation, to amount to an estoppel, must be wilful, and made with intent that it shall be acted upon by the party to whom it is made: *Pickard* v. *Sears* (2); *Gregg* v. *Wells* (3); *Evans* v. *Collins*. (4) The doctrine laid down by Parke, B., in *Freeman* v. *Cooke* (1) is approved of by Blackburn, J., in *Swan* v. *North British Australasian Co.* (5) And see the notes to *Duchess of Kingston's Case*. (6) This precise question

(1) 2 Ex. 654; 18 L. J. (Ex.) 117.
(2) 6 Ad. & E. 469.
(3) 10 Ad. & E. 90.
(4) 5 Q. B. 804.
(5) 2 H. & C. 175, 181; 32 L. J. (Ex.) 273.
(6) 2 Sm. L. C. 6th ed. 677, 766.

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arose in a case of *Scales* v. *London and South Western Ry. Co.* (1) There the defendants were carriers from France to London, and were in the habit of receiving goods consigned to the plaintiff, advising him of their arrival, and holding them until the plaintiff sent to fetch them away. A parcel having arrived not addressed, the defendants, assuming that the goods were for the plaintiff, advised him of their arrival, and he paid them the charges thereon and accepted a draft for the price of the goods. In trover against the company, it was held that they were not estopped from shewing that they had not in fact received the goods for the plaintiff.

Gully, in support of the rule. The finding of the jury establishes that there was a representation by the defendants which was untrue, and that the plaintiff, acting upon that representation, sold the goods, and thereby sustained a loss which but for the representation of the defendants would not have fallen upon him. Having induced the plaintiff to believe that they held the goods at his disposal, and the plaintiff having acted upon that belief, the defendants were estopped from averring that the goods had never reached their hands. For this *Freeman* v. *Cooke* (2) is a distinct authority.

[DENMAN, J. The mistake originated with the plaintiff's vendors, the Bridgewater Smelting Company. All that the finding of the jury amounts to is that the defendants, though informed that their advice-note was founded upon a mistake, negligently omitted to rectify it.]

In *Freeman* v. *Cooke* (2), Parke, B., after stating the rule as laid down in *Pickard* v. *Sears* (3) to be, "that, whenever one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time," goes on (4): "By the term '*wilfully*,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that

(1) Argued in the Queen's Bench on the 9th of May, 1872, but not reported.

(2) 2 Ex. 654; 18 L. J. (Ex.) 117.

(3) 6 Ad. & E. 469.

(4) 2 Ex. at p. 663.

it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." The present case falls precisely within that principle, which was acted upon in the case of *Re Bahia and San Francisco Ry. Co. and Tritton* (1): and see *Stonard* v. *Dunkin.* (2) Having given the plaintiff information which was calculated to mislead and which did mislead him, it was the defendants' duty, the moment they discovered their mistake, to give the plaintiff notice of it: and this the jury find they did not do.

[DENMAN, J. How can the defendants be guilty of a conversion of goods which it is admitted they never had in their possession?]

The goods were not found until after the commencement of the action. Even if there is no estoppel, the advice-note amounts to a contract to deliver the goods to the plaintiff, for the breach of which the defendants are clearly liable.

Cur. adv. vult.

Jan. 20. The judgment of the Court (Brett and Denman, JJ.), was delivered by

BRETT, J. This case was tried in the Passage Court of Liverpool. A verdict was by the direction of the learned assessor who tried the cause entered for the defendants. Leave was given to the plaintiff to move this Court to enter the verdict for the plaintiff for 70*l.* or such other sum as the Court should be of opinion that, on the present or any amended pleadings, the plaintiff was entitled to recover.

The facts given in evidence on the trial were that the plaintiff, who carried on business at Liverpool as Carr & Co., entered, in February, 1873, into a contract with Allan & Co. of Glasgow for the purchase of 35 tons of bleaching-powder, to be delivered in lots of about 5 tons per month. Allan & Co., in order to fulfil their contract, entered into one with the Bridgewater Smelting

(1) Law Rep. 3 Q. B. 584. (2) 2 Camp. 344.

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Company, who were manufacturers at St. Helen's, for the supply of 35 tons of bleaching-powder to their order. The works of the smelting company were situated at about a mile and a half from a goods office of the defendants at St. Helen's. The smelting company had a private line to join the defendants' line, and were supplied by the defendants with waggons to be loaded by the smelting company at their works, and to be left at the junction to be picked up by a passing goods train. In ordinary course of business, when the smelting company had loaded and addressed a waggon for any consignee, they sent to the defendants a "consignment-note," containing the date of the loading, the nature of the goods loaded, the marks and numbers of the packages, the station to which the goods were ordered, and the name of the consignee to whose order the goods were to be delivered. The consignment-note was acknowledged by the railway company, but with the remark "not seen." Upon the receipt of the consignment-note, a clerk of the defendants would advise it to the station to which the goods were consigned, and a clerk at that station would thereupon send an "advice-note" to the consignee. The description of the goods in the advice-note was in ordinary course a copy of the description in the consignment-note. This was because the goods were "not seen" by the defendants' servant when sent forward.

Powder being manufactured, an invoice was on the 30th of May sent by the smelting company to Allan & Co., and another from Allan & Co. to the plaintiff, for the price of 14 casks, A. 1 to 14. On the 30th of June, an invoice was sent by the smelting company to Allan & Co., and another by Allan & Co. to the plaintiff, for the price of 15 casks, B. 1 to 15. And on the same day, the 30th of June, other invoices were sent in the same way for 15 casks, B. 16 to 30. On the 3rd of July the plaintiff, having notice that the bleaching-powder was to come from the smelting company at St. Helen's, wrote to them "to have the 10 tons of bleach, A. 1 to 14 and B. 1 to 15 sent to Wapping Station, Liverpool, to the plaintiff's order." No such letter was ever sent by the plaintiff with regard to casks marked and numbered B. 16 to 30.

On the 5th of July the smelting company loaded waggons with 14 casks of bleaching-powder marked and numbered A. 1 to A. 14, and with 15 casks marked and numbered B. 1 to B. 15; but they

never loaded any waggon with casks marked and numbered B. 16 to B. 30, though they had marked and numbered 15 casks with those marks and numbers in their warehouse.

On the 5th of July, the shipping clerk of the smelting company forwarded to the defendants' station at St. Helen's a consignment-note in the following form:—"Delivered in good order, &c., in waggons numbered, &c., 14 casks bleaching-powder, mark A. Nos. 1/14, to be forwarded to Wapping Station, Liverpool, for the order of Carr & Co." On the same day, the clerk sent a similar consignment-note for 15 casks, but by mistake gave the marks and numbers as "Mark B. Nos. 16/30." These consignment-notes were acknowledged by the defendants' clerk at St. Helen's, but with the remark "not seen," and the consignments were by the defendants' clerks at St. Helen's advised by the same marks and numbers to the defendants' clerks at Liverpool. On the 7th of July, the defendants' clerks at Liverpool sent to the plaintiff an "advice-note," as follows:—

"Advice of Goods. Wapping Station, 7th July.

"The undermentioned goods consigned to you are advised here to your address. I will thank you for instructions as to their removal hence as soon as possible, as they remain here to your order, and are now held by the company, not as common carriers, but as warehousemen, at owner's risk, &c., and subject to the usual warehouse charges in addition to the charges now advised.

From	No. of Packages.	Species of Goods.	Marks.	Weights.	Total.
St. Helen's	15	Casks B. Powder	B. 16/30	..	1 0 10
10 6/442	14	,,	A. 1/14	..	0 17 11"

On the same 7th of July, the shipping clerk of the smelting company discovered his mistake in stating one of the consignments sent forward to be 15 casks B. 16 to 30. No such casks were ever delivered by him into any waggon of the defendants. He thereupon took to the defendants' office at St. Helen's an amended consignment-note, described on the face as "corrected," and giving the marks and numbers of the 15 casks as B. 1 to 15.

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This was advised to the defendants' clerks at Wapping, who thereupon forwarded to the plaintiff, but not on paper of the colour ordinarily used for corrected advice-notes, an advice-note in the following form:—

"Advice of Goods. 9th July.

"The undermentioned goods consigned to you are advised here to your address. I will thank you for instructions," &c.

This was in the ordinary printed form, as before, but was then filled up as follows:—

From	No. of Packages.	Species of Goods.	Marks.	Weights.	Total.
St. Helen's 12 $\frac{5}{575}$	15	Casks B. Powder	B. 1/15	..	0 19 0

"Originally entered per our invoice $10_{\frac{6}{4\,4\,2}}$ July 5th, 1873."

The number $10_{\frac{6}{4\,4\,2}}$ is a reference to the number on the former advice-note.

Afterwards, in August, the smelting company, making another mistake, sent to Allan & Co., and they sent to the plaintiff, an invoice for the price of three parcels of goods as delivered, viz. for 14 casks A. 1 to 14, for 15 casks B. 1 to 15, and for 15 casks B. 16 to 30; and the plaintiffs paid such invoice by acceptance.

On the 21st of August, the plaintiff's broker presented at the defendants' office at Liverpool the advice-notes of the 5th and 7th of July, in order that, according to custom, the warehouse charges might be added to them; and the defendants' clerks, not noticing and not being informed that the second was in correction of part of the first, added to the first the warehouse rent for two parcels, A. 1 to 14 and B. 16 to 30, and to the second for B. 1 to 15, and received payment.

Afterwards, the casks A. 1 to 14, and B. 1 to 15, were delivered to the plaintiff's vendees; but, when they demanded 15 other casks B. 16 to 30, the mistake was discovered and made known to all parties. The plaintiff thereupon desired that, if no such casks had been delivered for him to the defendants, none such should then be accepted by them on his account.

The plaintiff's purchasers then bought in 15 casks against him at a loss to him of 5*l.* 4*s.* 1*d.*, the value of the 15 casks B. 16 to 30 being said to be in August, if they had been sent forward, 65*l.*

The present action was brought by the plaintiff against the defendants to recover the value of 15 casks B. 16 to 30, and the damages to him by reason of the loss on the purchase against him,—first, on a count in trover,—and, secondly, on a count alleging a bailment to the defendants upon an undertaking by them to deliver to the plaintiff's order, on demand. The plaintiff's counsel, at the hearing before us, proposed a further count, averring that, in consideration of the plaintiff's paying rent for 15 casks B. 16 to 30, according to notice from the defendants, they warranted that they had such casks in their possession, and promised to deliver them on demand.

The jury at the trial, in answer to the only question left to them, found "that the defendants knew of the mistake on the 9th of July, and that there was no sufficient intimation by the defendants to the plaintiff of the mistake." They founded the latter part of their decision, as we were informed, upon the fact that the corrected advice-note was not on paper of the usual colour.

Upon these facts, it was argued before us on behalf of the plaintiff, that the defendants were estopped from alleging that they had not received 15 casks B. 16 to 30; that, consequently, they had refused to deliver on demand 15 such casks, which they could not deny that they had received; and that they must therefore be taken to be guilty of a conversion of 15 such casks; and that, if not liable in trover, they were liable upon a contract to be implied from their representations or conduct, and a consequent alteration of the position of the plaintiff acting on the faith of such representations or conduct.

It was argued on behalf of the defendants that there was no estoppel, and, if no estoppel, no such contract as is relied on in either the original or the amended count.

If there be no estoppel, we are of opinion that there is no such contract as has been relied on, or as could make the defendants liable for breach of contract. If there is no estoppel, the case must be considered upon the basis that no such casks as 15 casks

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B. 16 to 30 were ever in the possession of the defendants. Then there is no foundation for the contract set forth in the declaration, which rests upon a promise founded upon the consideration of an alleged delivery of 15 casks to the defendants. And, as to the amended count, there is no evidence that the defendants ever intended, that is to say, had it in their minds, to enter into a contract of guarantee such as is alleged in the amended count, or that any statement of theirs caused or could reasonably cause the plaintiff to trust in such a guarantee as a contract of guarantee. In either view, therefore, if there is no estoppel, there was no contract. If there is no estoppel, it is obvious that there is no case in trover: but, if there is an estoppel, then the defendants being prohibited from averring that they did not as carriers receive such goods upon an undertaking to the consignor to deliver them to the order of the plaintiff, and there being a demand and refusal, it seems to us impossible to say that a jury ought not to find a conversion and a verdict for the plaintiff on the count in trover. It may be also that, if the defendants are estopped from denying that they had such goods, they have made themselves liable to the plaintiff in contract to deliver to him the goods on demand. If there be an estoppel, a question may arise as to the amount of the damages. The question of liability, as it seems to us, depends entirely upon whether the defendants are or are not estopped in an action brought against them by the plaintiff. In order to justify the plaintiff in his assertion that the defendants are estopped as against him from denying that they were in possession of 15 casks of bleaching-powder B. 16 to 30, which they were, if in possession of them, bound to deliver to him, he must bring the case within one of the recognized propositions of an estoppel in pais.

One such proposition is, if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

The present case cannot be brought within that proposition, because it is not pretended that there was any statement or

conduct false to the knowledge of the defendants or any of their servants.

Another recognized proposition seems to be, that, if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

And another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

It seems to us that the plaintiff has failed to bring the present case within the bounds of either of those propositions.

As to the first, it cannot, as it seems to us, be truly affirmed that the defendants intended any representation of theirs to be acted upon by the plaintiff in the way of re-selling the goods. There is no evidence of a custom to re-sell upon the faith of such an advice-note as a railway company sends to a consignee: the only intention on the part of the defendants which can be properly inferred from the sending of an advice-note is, that the consignee should send for the goods. If the first intention could be inferred, the plaintiff did not, in re-selling, act upon any representation of the defendants, for he re-sold before they made any communication to him. In re-selling, he neither acted upon nor was damaged by reason of any representation of theirs. And, if the second intention be inferred, the defendant did not act upon it by sending for the goods: he never did send for them. And, if it can be said that by means of his vendees he did, he suffered no damage by reason of sending for them: any damage which he suffered was by reason of the re-sale. Neither the payment of the warehouse-rent nor of the invoice price can be relied upon as damage resulting from the conduct relied upon to support an estoppel to deny the pos-

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session of the goods, because either damage can be rectified without the intervention of such an estoppel: there is no consideration for either payment: both were made under a mistake of facts.

As to the second proposition, it is open to the same objections, and to this further one, that, notwithstanding the finding of the jury, we are not prepared to say that the plaintiff's servants could have been misled, if they had acted with reasonable care and attention. The original advice-note sent to the plaintiff contained two lots of casks: one of 14 casks, marked A. 1 to 14; and another of 15 casks, marked B. 16 to 30: the corrected advice-note speaks of one lot of 15 casks; if it refers at all to the former advice-note, it must refer to the lot of 15 casks, and not to that of 14 casks. It does, we think, refer distinctly to the former advice-note, by the entry "originally entered per our invoice, $10\frac{6}{4\,4\,2}$, 5th July, 1873." The date is that of the former advice-note, and the figures $10\frac{6}{4\,4\,2}$ are those of the former advice-note. The smallest attention to this entry must, in our opinion, have led the plaintiff's clerks to see that the second advice-note referred to the lot of 15 casks marked and numbered B. 16 to 30 in the first advice-note, and was intended to correct the marks to B. 1 to 15.

The finding of the jury does not affect the conduct of the plaintiff's servants, but amounts only to a finding that the defendants' servants did not take the best course.

There is yet another proposition as to estoppel. If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to shew that the state of facts referred to did not exist.

Here, again, we are of opinion that the plaintiff fails to bring the present case within the proposition. The jury have not found negligence on the part of the defendants; and, as everything on their part seems to have been in ordinary course, unless it be the difference of colour of the paper of the corrected advice-note, we are not prepared to say that that alone amounts to culpable

negligence. If there was negligence, it did not induce the plaintiff to re-sell. The re-sale was the only cause of damage to the plaintiff.

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We are, therefore, of opinion that the plaintiff has failed to make out that the defendants were estopped; and are of opinion that the verdict was properly entered for the defendants, and that this rule must be discharged.

Rule discharged.

Attorneys for plaintiff: *Bridger & Collins, for Francis & Collins, Liverpool.*

Attorney for defendants: *R. F. Roberts.*

ALLETSON AND ANOTHER *v.* CHICHESTER AND OTHERS; WAKE AND ANOTHER, CLAIMANTS.

Jan. 21.

Bankruptcy—Life Policy in the Order and Disposition of the Bankrupt—Notice of Assignment to the Office.

In 1845 R. effected a policy for 1000*l.* upon his life, and assigned it by way of mortgage to G. In 1858, W. (who was G.'s attorney) went to the office to pay a premium and to confer with the secretary upon other business connected with the office, and then informed him of the assignment. In 1862 R. became a bankrupt, and he died in 1871. After the death of R. the office for the first time had notice of his bankruptcy:—

Held,—upon a special case, the Court to draw inferences of fact,—that the conversation between W. and the secretary in 1858 was a sufficient notice to the office that the policy had been assigned and was not in the order and disposition of R.; the statute requiring such notices to be in writing not being at that time in existence.

THE plaintiffs sued the defendants as directors of the Legal and General Life Assurance Society (being the persons liable to be sued) upon a policy of insurance bearing date the 28th of August, 1845, and numbered 2644, effected with the society upon the life of one Samuel Russell, deceased. The plaintiffs sued, under the provisions of the statute to enable assignees of policies of life-assurance to sue on them in their own names, as executors of Joseph Boaler, deceased.

The claimants are W. Wake and T. W. Rodgers, registrars of the county court of Yorkshire holden at Sheffield, as trustees of

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the estate of Russell under the bankruptcy law. Upon interpleader proceedings taken by the defendants, an order was made by Hannen, J., that the defendants should pay into Court 1322*l.*, to abide the decision of a special case to be stated between the parties.

1. By a policy of insurance, No. 2644, dated the 23rd of August, 1845, effected with the Legal and General Life Assurance Society, under the hands of three of the directors of the society, a sum of 1000*l.* was assured to be paid to the executors, administrators, or assigns of Samuel Russell within three calendar months after proof of the death of Russell, together with such further sum or sums as should be added to the sum assured as a bonus under the provisions of the deed of settlement of the society, unless an equivalent for such further sum or sums should have been paid or allowed to the party or parties entitled thereto. The annual premium payable to the society during the continuance of the insurance was 26*l.* The circumstances under which the policy was effected were as follows:—

2. In the year 1845, Samuel Russell and Sarah his wife applied to Mr. John Whall, an attorney and solicitor carrying on business at Worksop, to raise for him a loan of 500*l.* Sarah Russell was at that time entitled for life to the rents of certain freehold and leasehold hereditaments and premises situate at Sheffield; and Samuel Russell was entitled to an estate for life in remainder in the same hereditaments expectant on the decease of his wife.

3. Whall was at that time the attorney and solicitor of Edward Girdler of Netherthorpe; and Whall applied to him for the loan so required by the Russells, and Girdler agreed to lend the amount upon condition that the repayment with interest at 5*l.* per cent. per annum should be secured to him by a conveyance and assignment by the Russells of their respective interests in the hereditaments and premises at Sheffield, and by the assignment of a policy of assurance to be effected upon the life of Samuel Russell in the sum of 1000*l.* at the least.

4. Russell thereupon applied to the Legal and General Assurance Society to insure his life; and on the 22nd of August, 1845, he brought to Whall a letter of approval by the society of a proposal made by him to the society for an insurance on his life

for 1000*l.* On the same day, at the request of Russell, Whall sent by post to Edmunds, the then actuary of the society, a banker's draft for 29*l.*, being the amount of the first annual premium and stamps, payable in respect of such insurance, accompanied by a letter as follows:—

"Worksop, 22nd August, 1845.

"Dear Sir,—Inclosed herewith I send you, at the request of Mr. S. Russell, his declaration and proposal for an assurance for 1000*l.* upon his own life. I also send you a banker's draft for 29*l.*, the amount of the first annual premium and stamp. The policy must be sent to me when completed, and notice of renewal must also be sent to me annually in the usual course. I understand from Mr. Russell that he signed a declaration when in town. Will you allow me to inquire whether both declarations are to be the basis of this contract with the society? I am not aware whether they are the same or different forms. You will observe I have not made any deduction in this remittance for the usual allowance of commission to solicitors; but I presume a commission will be allowed to me by the office. Will you be good enough to inform me whether you have any shares to dispose of, and also send me a prospectus.

(Signed) "John Whall.

"P.S.—Your letter of approval is dated the 5th instant, and No. 3403."

5. By deed dated the 25th of August, 1845, Samuel Russell and Sarah his wife conveyed and assigned the policy and the money thereby secured, and their several and respective interests in the hereditaments and premises at Sheffield, to Girdler, his executors, administrators, and assigns, for the purpose of securing the repayment of the sum of 500*l.*, which was then advanced by him to Russell, with interest at the rate of 5 per cent. per annum.

6. On the 3rd of September, 1845, Whall received by post from the Legal and General Assurance Society the policy of assurance, and retained it on behalf of Girdler, and continued to retain it until the date of the transfer of the security of the 25th of August, 1845, hereinafter referred to.

7. Whall acted as attorney and solicitor for Girdler and for

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Russell in all matters and transactions relating to the said loan.

8. Russell, by indenture bearing date the 30th of March, 1853, and made between himself of the one part and W. Radley of the other part, in consideration of 600*l.* then due and owing from Russell to Radley, assigned the said policy of assurance and the money thereby assured (subject to the security of the 25th of August, 1845,) as a security for the payment to Radley of 600*l.* and interest at 5 per cent. per annum.

9. Whall acted as the attorney and solicitor of Russell and also of Radley in the matter relating to the indenture of the 30th of March, 1853; and Whall was also at that time acting as the attorney and solicitor of Girdler.

10. The indenture of the 30th of March, 1853, and the principal money and interest thereby intended to be secured were, by an indenture dated the 14th of April, 1864, made between Radley of the first part, Russell of the second part, and Elizabeth Fowe of the third part, duly assigned to Elizabeth Fowe; and there is now due and owing to her 1100*l.* and upwards. Whall does not now act as the attorney or solicitor of Elizabeth Fowe.

11. The Russells had, previously to the execution of the indenture of the 30th of March, 1853, viz. in 1848, borrowed of Radley certain sums of money on security of their interests in the hereditaments and premises at Sheffield, and of certain policies of assurance which are not the subject of this action.

12. In the year 1850, Girdler (the interest due on his security of the 25th of August, 1845, being then in arrear,) instructed Whall on his behalf to enter into the receipt of the rents and profits of the hereditaments and premises at Sheffield. Whall was also subsequently instructed by Radley to enter into receipt of the same rents and profits. Whall entered into the receipt of the said rents and profits accordingly, and continued to receive the same until the death of Russell in August, 1871. The said rents and profits were applied by Whall, first, in payment of the premiums from time to time payable in respect of the policy which forms the subject of this action, and in payment to Girdler and his transferees hereinafter mentioned of the interest due in respect of the security of the 25th of August, 1845, and in the next place in

payment of the premiums of other policies of insurance and interest upon other incumbrances with which the said rents and profits were charged by the Russells.

13. On the 25th of August, 1858, Whall wrote to Mr. Nettleton, the secretary or actuary for the time being of the Legal and General Assurance Society, as follows:—

"Worksop, 25th August, 1858.

"Dear Sir,—Our clients, the Worksop Local Board of Health, have occasion to raise under the powers of an Act of Parliament 6000*l.*, repayable in thirty annual instalments, with interest. May we ask whether your directors will lend the board this sum, and at what rate of interest? . . . . I shall have occasion to call upon you on Friday next, the 27th inst., with the premium payable on policy No. 2644, and will take that opportunity of conferring with you on the subject of the loan.

(Signed) "John Whall."

14. On the 27th of August, 1858, Whall, who was still acting as the attorney and solicitor of Girdler, went to the office of the Legal and General Life Assurance Society in London, and there saw Mr. Nettleton, the secretary or actuary of the society, and paid the premium of 26*l.* then payable in respect of the said policy.

15. Whall states that on that occasion he told Mr. Nettleton that the policy had been assigned to Girdler, who was his (Whall's) client, and also to another client of his, by way of mortgage. Whall states that he further told him that the moneys applicable to keeping alive the policy were heavily incumbered by subsequent deeds, and that he inquired of Mr. Nettleton whether the bonuses which had at that time accrued in respect of the policy could be applied in reduction of the annual premium payable thereon. In reply to Mr. Nettleton's answer to Whall's inquiry, Whall states that he told Mr. Nettleton that the reduction he offered to make on behalf of the insurance society was not such as to justify the mortgagees in making or concurring in such arrangement. Whall is unable to state at this distance of time the exact words used by him at the said interview; but he states that they were to the above effect, and as explicit as above stated. Mr. Nettleton, however, has no recollection of any such transaction.

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16. At the same interview Whall asked Mr. Nettleton what was the decision of the society in respect of the proposed loan to the Worksop Local Board of Health mentioned in the letter of the 25th of August, 1858, and was informed that the security could not be accepted by the society.

17. By deed dated the 6th of May, 1861, Girdler, in consideration of 500*l.* paid to him by Joseph Boaler, assigned and transferred to Boaler, his executors, administrators, and assigns, the said security of the 25th of August, 1845, and the said policy of assurance, and the sums of money thereby assured, with full power and authority for him or them as the attorney or attorneys of Girdler, his executors or administrators, to sue for the said sums which should eventually become payable under the said policy and the said sum of 500*l.* and interest, and to give effectual discharges for the said sums respectively. No notice of this assignment or transfer was given to the society.

18. Whall acted as the attorney and solicitor of Girdler and also of Boaler in all matters relating to indenture of the 6th of May, 1861.

19. There was no statement in the affidavits upon which the matter was before Hannen, J., as to there being any usage of the society in respect of notices of transfers of policies.

20. Russell was adjudicated a bankrupt on the 25th of June, 1862. He obtained on the 2nd of August, 1862, an order of discharge, under the hand of the commissioner and under the seal of the court of bankruptcy for the Leeds district. Whall did not act as the attorney or solicitor for Russell in the matters relating to his bankruptcy.

21. In the balance-sheet filed by Russell on his bankruptcy, Boaler was entered as a creditor holding a mortgage of the freehold and leasehold hereditaments in Sheffield and also the policy of assurance.

22. Boaler died on the 6th of January, 1867, and the plaintiffs are the executors under his will.

23. The annual notices for the renewal of the policy and also notices of all bonuses accruing thereon were on all occasions sent to Whall by the secretary or actuary for the time being of the Legal and General Life Assurance Society. All the premiums

were paid by Whall; and, since the time of his entering into receipt of the rents and profits of the hereditaments and premises at Sheffield, the premiums were paid by Whall out of such rents and profits. The society allowed Whall a commission on the sums so paid.

24. The policy, which was not under seal, has always been retained in the possession of Whall from the time when it was sent to him, and it was never in the possession of Russell.

25. The principal sum of 500*l.* secured by the indenture of the 25th of August, 1845, and the transfer thereof, with an arrear of interest, is still due to the plaintiffs.

26. Thomas Taylor, of East Retford, who was appointed trade assignee under the bankruptcy of Russell, is dead. No fresh assignee was appointed. The proceedings in the bankruptcy were transferred from the Leeds Bankruptcy Court to the county court of Yorkshire holden at Sheffield, under the provisions of the Bankruptcy Act, 1869.

27. Neither the official assignee nor the creditors' assignee appointed under the bankruptcy ever made any claim to be entitled to the policy or the money thereby secured during the life-time of Russell, nor after his death, until after the commencement of this action.

28. On the 14th of August, 1871, Whall wrote and sent to Mr. Nettleton, as the actuary of the Legal and General Life Assurance Society a letter, as follows:—

"Worksop, 14 August, 1871.

"Policy 2644.

"Dear Sir,—I have to inform you that this assured, Mr. Samuel Russell, died last week, and was buried at Blyth on Friday, the 11th instant. I act for the assignee of this policy, and shall be obliged by your furnishing me with the necessary forms for proving the death of the assured.

(Signed) "John Whall."

29. On the 28th of October, 1871, W. H. Haycock, acting on behalf of a creditor of Russell, wrote to the society informing them that Russell had been adjudicated bankrupt in 1862.

30. The claimants, the registrars of the county court at Sheffield now represent the official assignee in the bankruptcy of Russell.

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31. On the 10th of June, 1872, this action was commenced by the plaintiffs against the defendants, as directors of the Legal and General Life Assurance Society, being the persons liable to be sued, to recover the amount payable by the society under the policy. On the 2nd of July, 1872, the declaration in this action was served.

32. An interpleader summons having been taken out by the society, it was ordered by Hannen, J., that the society should pay into Court the amount payable under the policy, being 1322*l.*, to abide the decision of a special case to be stated, as hereinbefore mentioned.

33. The Court were to be at liberty to draw any inferences of fact which a jury might have drawn; and the documents therein referred to were to be taken as part of the case. It is to be taken for the purposes of this case, but not otherwise, that an order for sale under the 125th section of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), has been duly obtained.

The question for the opinion of the Court was, whether the plaintiffs or the registrars of the county court of Sheffield are entitled to have the said sum or any and what part thereof paid over to them, subject to any order which may be made by this Court respecting the costs. And the Court may direct to whom and in what way the moneys shall be paid out of Court, or be otherwise disposed of, or what accounts, if any, are to be taken, and by whom and where.

Lumley Smith, for the plaintiffs. The material facts are substantially these:—On the 23rd of August, 1845, a policy for 1000*l.* was effected with the Legal and General Life Assurance Society upon the life of Samuel Russell. On the 25th of the same month, Russell assigned the policy to Girdler by way of mortgage, to secure an advance of 500*l.*; and in March, 1853, there was a further charge upon the same policy to one Radley. On the 27th of August, 1858, Whall, who was solicitor for all the parties, having previously (on the 25th) written a letter to the secretary of the society informing him that he was about to call and pay the premium due upon the policy, and to confer with him upon the subject of a proposed loan by the office to

another client of his, went to the office of the society and there saw the secretary, and told him of the charges upon the policy in question. In May, 1861, Girdler assigned all his interest in the policy to Boaler, whose personal representatives the plaintiffs are. In June, 1862, Russell became bankrupt, and he died on the 11th of March, 1871. On the 14th of March, 1871, notice of the death was sent to the society by Whall; and on the 28th of October, 1871, they received from a creditor of Russell notice of his bankruptcy. This action was commenced by the executors of Boaler on the 10th of June, 1872; and no claim was made in respect of the policy by the assignees under Russell's bankruptcy until after that time. There had been another policy on the same life effected with the Law Union Fire and Life Insurance Company, and that company, on receiving notice of the assignment and of the death of Russell, and afterwards notice of his bankruptcy, paid the amount of the policy into Court under the Trustee Act; and the notice of the assignment, though given after the death of the assured, was held to be a sufficient notice to take the policy out of the order and disposition clause of the Bankruptcy Act: *Re Russell's Policy Trusts.* (1) Here, the plaintiffs rely upon the notice given by Whall to the secretary of the society in 1858. Whatever doubt might formerly have existed upon the subject, it has long been settled that a life-policy is within the reputed ownership clauses: *Ex parte Cooper* (2); *Ex parte Rose* (3); *Ex parte Smith* (4); *Ex parte Heathcote.* (5) The question of reputed ownership is one purely of fact: *Hamilton* v. *Bell.* (6) The notice, to take the policy out of the order and disposition of the bankrupt, need not, before the 30 & 31 Vict. c. 144, have been in writing; mere knowledge in the office, acquired in the course of the transaction of the business of the company, will be sufficient: *Ex parte Stright* (7); *Ex parte Waithman* (8); *Ex parte Masterman* (9); *Tibbitts* v. *George* (10); *Smith* v. *Smith* (11); *Gale* v. *Lewis* (12);

(1) Law Rep. 15 Eq. 26.
(2) 2 M. D. & De G. 1.
(3) 2 M. D. & De G. 131.
(4) 2 M. D. & De G. 213.
(5) 2 M. D. & De G. 711.
(6) 10 Ex. 545; 24 L. J. (Ex.) 45.
(7) 2 D. & Ch. 314.
(8) 4 D. & Ch. 412.
(9) 4 D. & Ch. 751.
(10) 5 A. & E. 107.
(11) 2 C. & M. 231.
(12) 9 Q. B. 730; 16 L. J. (Q.B.) 119.

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Morris v. *Cannan* (1); *Ex parte Agra Bank, re Worcester.* (2) The facts stated in paragraphs 13—15 of the special case abundantly bring the present case within the rule, and shew that the defendants had notice of the assignment of the policy to Girdler before Russell's bankruptcy; for, it will scarcely be contended that the secretary or actuary of an insurance office is not the proper person to receive such a notice on their behalf.

Gould (*Day, Q.C.*, with him), for the defendants. There was no sufficient notice of the assignment to take this policy out of the order and disposition of the bankrupt. The secretary of an insurance company is, no doubt, for a variety of purposes, an officer whose acts will bind his principals: but the facts disclosed in this case do not amount to notice of the assignment to him. The utmost that can be said (assuming Whall's recollection to be accurate) is, that the fact of the assignment was mentioned in the course of a conversation about another transaction. It is evident that neither Whall nor Nettleton attached any importance to the statement at the time: and, if it had been understood by the latter to amount to a notice, some record would have been made of the fact. The case therefore differs materially from *Ex parte Agra Bank.* (2) Lord Justice Selwyn there says (3): "I quite agree with the observation of the Master of the Rolls in the case of *North British Insurance Co.* v. *Hallett* (4), that, 'if persons met in society, and, over the dinner table, or in casual conversation, an officer of the company heard the fact of the assignment mentioned, this, even though the speaker were the person who made the assignment, would not be sufficient notice;' and that, on the same principle as in the other case to which I alluded in the argument,—*Edwards* v. *Martin* (5),—casual notice to the secretary will not be sufficient." With regard to *Re Russell's Policy Trusts* (6), the assignees there, by not giving notice to the office, enabled the bankrupt to commit a fraud upon an innocent person; and that was the real ground of the decision of Vice-Chancellor Malins.

LORD COLERIDGE, C.J. I am of opinion that our judgment should be for the plaintiffs. The question arises on the sufficiency

(1) 4 D. F. & J. 581; 31 L. J. (Ch.) 425.
(2) Law Rep. 3 Ch. 555.
(3) Law Rep. 3 Ch. at p. 562.
(4) 7 Jur. (N.S.) 1263.
(5) Law Rep. 1 Eq. 121.
(6) Law Rep. 15 Eq. 26.

11 C.B.N.S. 653.

of a notice given to a life assurance society of the assignment of a policy so as to take it out of the order and disposition of the assured, who after effecting the policy and after the assignment became a bankrupt. The insurance was effected in 1845. At that time written notice of the assignment to the office was not necessary. The policy was, shortly after it was effected, assigned to persons whom the plaintiffs represent. The bankruptcy of the assured took place in the year 1862. The question really turns upon the sufficiency of the notice of that assignment given in August, 1858, which was anterior to the bankruptcy. That is the sole question which it becomes necessary for us to consider; for, if that was a valid notice, the other questions which were argued before us are immaterial. There is, no doubt, much force in the observation of Mr. Lumley Smith, that it is very difficult to apply the rules of bankruptcy as to order and disposition to property of this sort. However, it has more than once been decided that they are applicable, and it is now too late to dispute it. The Courts, then, having decided that a policy of assurance though assigned may still be in the order and disposition of the bankrupt, unless notice of the assignment has been given to the office, and that such notice, if given, will defeat the claim of the assignees in bankruptcy, the question is, whether the notice which was given in this case was sufficient. The principles upon which that question is to be decided have been the subject of discussion in a variety of cases. It is clear, to begin with, that the notice need not be in writing, nor directly in a transaction with reference to the policy itself. It has been held that knowledge of the fact of the assignment communicated in any other matter of business will suffice. It has also been held that notice to a director, or to the actuary or secretary, or to any other officer of the company whose duty it is to communicate the fact to the company, will bind them and defeat the claims of the assignees in bankruptcy. This was decided in *Edwards* v. *Scott* (1) and *Edwards* v. *Martin* (2), and also in the important case of *Gale* v. *Lewis* (3), where all the earlier authorities are cited. That being the state of the law, what are the facts here? They will be found in paragraphs 14

(1) 1 M. & G. 962.
(2) Law Rep. 1 Eq. 121.
(3) 9 Q. B. 730; 16 L. J. (Q.B.) 119.

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and 15 of the special case. [His Lordship read them.] Now, the statement of Mr. Whall (whose credibility is not impeached) contains direct evidence of notice; and it is not qualified by the mere absence of recollection on the part of Mr. Nettleton. That statement amounts in substance to this, that, in the month of August, 1858, Whall called at the office of the Legal and General Life Assurance Society in London in order to pay the premium due upon this policy, and that he there saw Nettleton, the secretary or actuary, and told him that the policy had been assigned to Girdler, who was a client of his, and also to another client; and that Whall further inquired of Nettleton whether the bonuses which had at that time accrued in respect of the policy could be applied in reduction of the annual premium payable thereon; and that, in reply to Nettleton's answer to that inquiry, Whall told him that the reduction he offered to make was not such as to justify the mortgagees in entering into the arrangement. Now, power is reserved to us by this special case to draw inferences of fact; and, dealing with the statements therein contained according to the recognized principles, it appears clear to me that Nettleton was the very person to whom it was proper to give a notice of this kind, and that such a notice was given to him. The conclusion I come to therefore is, that, in August, 1858, the office had notice of the assignment of the policy, that the decided cases are enough to prevent the application of the order and disposition clauses of the Bankruptcy Acts, and that the title of the assignees of the policy was complete so as to prevent the policy passing to the trustee or assignee under the bankruptcy of Russell, and consequently that the plaintiffs are entitled to our judgment.

KEATING, J. The policy in question was effected in August, 1845. On the 25th of that month it was assigned to one Girdler by way of security for an advance of money. In 1862, the assured became a bankrupt; and the question is whether,—it having been decided that policies of assurance on lives may be within the order and disposition clauses of the Bankruptcy Acts,—this policy was at the time of the bankruptcy of the assured in his order and disposition with the consent of the true owner, Girdler; and that depends upon whether before and at the time of his bank-

ruptcy, in 1862, Russell, the assured, had the consent of the true owner to his being the apparent owner of the policy; or, in other words, whether a notice had been given to the Legal and General Assurance Society on behalf of Girdler that he was the true owner thereof. Now, in 1858 (which was before Russell's bankruptcy), the communication took place which is relied upon by the plaintiffs as a notice of assignment. On the 25th of August in that year, Whall, who was the authorized agent of Girdler, writes to the secretary or actuary of the society,—"I shall have occasion to call upon you on Friday next, the 27th inst., with the premium payable on policy No. 2644," the policy in question. Accordingly, on the 27th of August, Whall did call at the office of the society in London, and paid the premium. There can be no doubt that Whall intended accurately to represent the conversation which took place between him and Nettleton upon that occasion; and it appears to me that the notice given was a very precise notice, and it was, I apprehend, given to one who was quite justified and called upon to accept the notice in the terms in which it was given. It was a distinct notice of an assignment of the policy to Girdler, and it was given to one who was the proper person to receive such a notice on behalf of the society. *Gale* v. *Lewis* (1) goes the whole length of saying that knowledge of the person who is competent to receive notices on behalf of the company is the knowledge of the company, even though the notice has not been communicated to the company. If so, Nettleton, who was the proper person to receive notice on behalf of the assurance society, having acquired knowledge of the assignment, I am of opinion that that was the knowledge of the society, and was sufficient to determine the consent of the true owner to the policy remaining in the order and disposition of the assured. I therefore agree with my Lord that the plaintiffs, who are the executors of Boaler, the assignee of the policy, are entitled to our judgment.

GROVE, J. I am of the same opinion. There is much force in the observation of Mr. Gould that a matter of this sort is not to be determined by a mere casual conversation; but that the circum-

(1) 9 Q. B. 730; 16 L. J. (Q.B.) 119.

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stances ought to be such that the Court may fairly infer from them that the notice of the assignment reached the company,—that it was given to a person whose duty it was to receive it as a matter of business on behalf of the company. Looking at paragraphs 13—15, I am clearly of opinion that there was such a notice given here as the secretary could receive and did receive in the course of discussing business connected with this subject. The letter of the 25th of August is addressed to Mr. Nettleton, the secretary. The first part of it relates to a negotiation for the loan of a large sum of money for other clients of Mr. Whall. It then goes on,—"I shall have occasion to call upon you on Friday next, the 27th instant, with the premium payable on policy No. 2644, and will take that opportunity of conferring with you on the subject of the loan." That letter appears to me to be important as shewing that Nettleton was a person with whom Whall was conferring upon important business of the society. Nettleton receives Whall in that capacity; and in the course of that conference Whall tells him that the policy in question has been assigned to Girdler, a client of his, by way of mortgage. He tells him that the moneys applicable to keeping alive the policy are heavily incumbered by subsequent deeds; and he inquires of him whether the bonuses which had at that time accrued in respect of the policy could be applied in reduction of the annual premium payable thereon. That was a matter of the greatest importance to the society. In reply to the secretary's proposition as to the bonuses, Whall states that he told him that the reduction he offered to make on behalf of the insurance society was not such as to justify the mortgagees in concurring in such arrangement. Here is a detailed account of a conversation with the secretary upon a matter of business of importance to the society; and I think it goes far beyond what has been held in some of the cases cited by Mr. L. Smith sufficient to fix the company. It is distinctly brought to the knowledge of the proper officer of the society that the policy is no longer in the hands of the original assured, but has been assigned by him: it is not a fact which was incidentally mentioned in the course of a conversation.

DENMAN, J. I am of the same opinion. I cannot help thinking

that the case is a very clear one. We stand in the position of a jury as well as a Court for administering law. The first question, which is rather one of law than of fact, is, whether Mr. Nettleton, the secretary or actuary of the society, was a proper person to receive such a notice or intimation as that now under consideration. I think he was a person who had authority to receive such a notice so as to bind the society. The next question is, what is the fair effect of the conversation which took place between him and Whall on the 27th of August, 1858. In my judgment it so clearly amounted to notice that the policy had been assigned, that, if the question had been left to a jury, and they had found otherwise, the Court would have been bound to set aside their verdict as unsatisfactory.

Judgment for the plaintiffs.

Gould prayed that the Court would, as was done in *Edwards* v. *Martin* (1), direct the costs to be paid out of the estate, and not by the defendants personally, they being official persons, and having no assets.

LORD COLERIDGE, C.J. We see no reason why we should depart from the ordinary course.

Judgment for plaintiffs, with costs.

Attorney for plaintiffs: *W. H. Tattam.*

Attorneys for claimants: *Dobinson, Geare, & Son, for A. S. Wake, Sheffield.*

(1) Law Rep. 1 Eq. 121.

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Jan. 27.

CLARE *v.* LAMB AND ANOTHER.

Sale of Leaseholds—Equity of Redemption—Covenant for Title—Money had and received—Failure of Consideration.

Leasehold premises were mortgaged by S., who subsequently married L. After the death of L., his executors concurred in a sale by the mortgagee to C., and received the balance of the purchase-money after payment of the mortgage-debt, interest, and expenses, and, in the bonâ fide belief that L. was legally entitled to the equity of redemption, disposed of such balance as part of his estate. S., the widow of L., afterwards filed a bill against C., the purchaser, to recover the property, and obtained a decree against him for the value of the equity of redemption,—C. being treated as assignee of the mortgage:—

Held, that C. could not recover back the money paid to the executors, as upon a failure of consideration; but must have recourse to his remedy upon the covenant for title, if any.

ACTION for money had and received. Plea, never indebted.

The cause was tried before Keating, J., at the sittings at Westminster after Easter Term, 1874. The facts were as follows:—A Mrs. Steiner, who possessed seven leasehold houses in the Mile End Road, mortgaged them in 1863 to one Dodd for 300*l.*, and afterwards further charged them with 100*l.* to a Mr. Watson. In 1864, Mrs. Steiner married Dr. Lamb, who died in 1869, having by his will appointed the defendants his executors. Shortly after the death of Dr. Lamb, Dodd, the first mortgagee, with the concurrence of the executors, put the premises up for sale by public auction, and Clare, the plaintiff, became the purchaser for 785*l.* The purchase-money was with the sanction of the executors applied in part in paying off the two mortgages and paying the expenses of the sale and conveyance; and the balance, 241*l.* 8*s.* 2*d.*, was paid by Clare to the executors. The conveyance was executed by all the parties, and Clare received possession of the premises from Dodd. The deed contained no covenant for title in the executors.

In 1872, Mrs. Lamb, the widow of Dr. Lamb, discovering that she was entitled to the property, filed a bill in Chancery against Clare to recover possession. Clare gave notice of this claim to the defendants, Dr. Lamb's executors. On the 21st of February, 1874, a decree was pronounced in the suit, treating Clare as the

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assignee of the mortgagees, and directing an account, and that the surplus, after deducting the mortgage-money, interest, and expenses, should be paid over by Clare to Mrs. Lamb. Clare then (in October, 1873,) brought this action against the defendants to recover back the money which he had been called upon to pay to Mrs. Lamb, viz. the value of the equity of redemption.

The learned judge nonsuited the plaintiff, on the ground that under the circumstances money had and received would not lie: but he reserved leave to the plaintiff to move to enter a verdict for him for 240*l.*, the agreed value of the equity of redemption, if the Court should be of opinion that the action was maintainable.

H. Matthews, Q.C., in Trinity Term last, obtained a rule nisi accordingly, on the ground that the money was paid under a mistake, and that there was a total failure of consideration for the payment. He cited *Hitchcock* v. *Giddings* (1), *Bos* v. *Helsham* (2), and *Cooper* v. *Phibbs.* (3)

Jan. 27, 1875. *Garth, Q.C.*, and *Charles*, shewed cause. The sale took place under a mistake: all parties assumed that the balance of the purchase-money, after paying off the mortgages, would form part of Dr. Lamb's estate. Under these circumstances, there being no covenant for title on the part of the executors, the maxim caveat emptor applies, and the purchaser cannot recover back the money which the vendors have innocently received: *Bree* v. *Holbech* (4); *Cripps* v. *Reade* (5); *Johnson* v. *Johnson* (6); Sugden's Vendors and Purchasers, 13th ed. p. 440; Dart's Vendors and Purchasers, 4th ed. p. 711; 4 Cruise's Digest, p. 90; Broom's Maxims, 5th ed. p. 773. The very object of a person in a fiduciary position entering into covenants limited to his own acts and defaults only, is, to save him from responsibility for the acts and defaults of third parties: *Thackeray* v. *Wood* (7), *Bos* v. *Helsham* (2), and *Cooper* v. *Phibbs* (3) are altogether beside this case; and in *Hitchcock* v. *Giddings* (1) the money had not been paid, and the purchaser was relieved against a bond given to secure it, on the

(1) 4 Price, 135.
(2) Law Rep. 2 Ex. 72.
(3) Law Rep. 2 H. L. 149.
(4) 2 Doug. 654, a.
(5) 6 T. R. 606.
(6) 3 B. & P. 162.
(7) 6 B. & S. 766; 34 L. J. (Q.B) 226.

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ground of fraud. Further, this action is prematurely brought: the decree which declared Mrs. Lamb to be entitled to the equity of redemption was not pronounced until the 21st of February, 1874, which was after the commencement of the action.

Bosanquet and *Bompas*, in support of the rule. The defendants professed to sell a thing which they had not, and the plaintiff parted with his money without any consideration. It is no answer for the former to say that they have paid it over to the legatees under the will of Dr. Lamb: they are not without remedy. In all cases where money is paid under a mistake of fact, it may be recovered back. The origin of this doctrine is thus stated in Spence's Equity Jurisdiction, pp. 622, 623: "The Roman law enabled a person to avoid a contract on the ground of mistake, and that although it was his own mistake. It was considered a fraud to endeavour to take advantage of a stipulation entered into under a plain mistake. As regards mistakes arising from ignorance, a distinction was taken between ignorance of law and ignorance of fact. A person could not set up the former as a ground to avoid an obligation. But it was not in every case that ignorance or mistake as to fact was available: no help was given where the ignorance arose from gross negligence or folly. A distinction was taken by Papinian in regard to ignorance of law: according to him, if a man had been induced by his ignorance of law to part with what was his own, he might recover it, or be placed in statu quo: but the pretence of ignorance of law could not be used to enable a person to acquire what had not been his own, or to better his condition. A person might not only defend himself from a demand made on him by reason of a contract entered into in ignorance or mistake of fact, but he might recover back money paid by mistake arising from such ignorance. As regards a sale, mistake as to the materia or corpus annulled it." Wherever a mistake goes to the whole root of the transaction, it may be rectified. *Bree* v. *Holbech* (1) was substantially a decision upon the Statute of Limitations: that part of the judgment which is relied on for the defendants was a mere obiter dictum. The general position laid down in Sugden and in Dart, that, where a conveyance has been executed and the money paid, the transaction cannot be

(1) 2 Doug. 654, n.

ripped up for a defect of title subsequently discovered, but that the remedy is upon the covenant, is not disputed. But this is not the case of a defective title: the defendants had not the thing they professed to sell and convey.

[GROVE, J. I sell you a farm, and execute a conveyance without any covenant for title, and it ultimately turns out, without any fraud on my part, that I had no title: can that be called a mistake?]

There would be a total failure of consideration. In Story's Equity Jurisprudence, 10th ed. § 142, it is said: "In cases of mutual mistake, going to the essence of the contract, it is not necessary that there should be any presumption of fraud. On the contrary, equity will often relieve, however innocent the parties may be. Thus, if one person should sell a messuage to another, which was at the time swept away by a flood or destroyed by an earthquake, without any knowledge of the fact by either party, a Court of equity would relieve the purchaser, upon the ground that both intended the purchase and sale of a subsisting thing and implied its existence as the basis of their contract. It constituted, therefore, the very essence and condition of their contract." Again, he says, § 143: "The same principle will apply to all other cases where the parties mutually bargain for and upon the supposition of an existing right. Thus, if a purchaser should buy the interest of the vendor in a remainder in fee expectant upon an estate-tail, and the tenant in tail had at the time, unknown to both parties, actually suffered a recovery, and thus barred the estate in remainder, a Court of equity would relieve the purchaser in regard to the contract, purely on the ground of mistake." For both these propositions, *Hitchcock* v. *Giddings* (1) is cited. In that case, the purchaser had given a bond for the purchase-money; and the Court restrained the vendor from enforcing it, on the ground that he had in ignorance sold that which in fact had no existence. Technically the judgment of Chief Baron Richards puts it as a case of fraud: but in substance and in truth it was a total failure of consideration. It would be manifestly contrary to good faith in the defendants to retain this money under the circumstances.

(1) 4 Price, 135.

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[DENMAN, J., referred to *Lindon* v. *Hooper* (1) and *Newsome* v. *Graham.* (2)]

As to the objection that the action was prematurely brought, —the position and rights of Mrs. Lamb were ascertained at the time of the issuing of the writ, though the decree had not then been actually pronounced.

GROVE, J. We are all agreed: but my Lord, being somewhat indisposed, has requested me to deliver my judgment first.

I am of opinion that the nonsuit was right, and that the rule should be discharged. The question arises thus:—Certain property was sold by auction, and by the conveyance, to which the defendants were parties, a mortgage was transferred to the purchaser, and the equity of redemption, the value of which was agreed to be 240*l.*, was also conveyed to the purchaser. It turned out that, so far as the equity of redemption was concerned, the title of the vendors was wholly defective. Their testator, Dr. Lamb, having died, it was discovered that the equity of redemption was in his widow; and she filed a bill in equity, and a decree was made declaring her to be entitled to it. The question submitted at the trial was, whether the purchaser, having paid 240*l.* for property to which the vendors had no good title, could recover back that sum as money had and received, upon a failure of consideration. In answer to the plaintiff's claim, it is contended that the maxim caveat emptor applies; and that, the defendants, as executors, having acted bonâ fide and in the belief that they had a good title, the plaintiff must take what he has got, and cannot recover back the money he has paid. It seems to me, upon principle, irrespective of the authorities, that the maxim referred to applies à fortiori to this case. If a man goes into a shop to buy a chattel, the seller, especially if he be the manufacturer, must necessarily know more of the nature and quality of the article than the buyer can. In that case, the rule caveat emptor is often a hard one, and yet it generally applies. In the case of the purchase of an interest in land, the person who sells places at the disposal of the buyer such title-deeds as he possesses and under which he claims. The purchaser has full

(1) 1 Cowp. 414. (2) 10 B. & C. 234.

opportunity for investigating the title of the vendor, and when he takes a conveyance he is assumed to have done so. Considerable inconvenience might result if this were not the rule. Conveyancers may agree upon the title, and, long after the conveyance has been executed, the whole transaction completed, and the proceeds disbursed, the seller might be called upon to return the purchase-money, by reason of some defect of which he had no notice at the time.

But there is an ordinary and well-known covenant which the purchaser may insist upon if he wishes to get more security than he gets by an investigation of the title; he may require a covenant for title; this additional security would probably increase the price. When the conveyance has been executed, all that the purchaser has to look to is the liability of the vendor under the deed. If it contains no covenant for title, the purchaser takes what the vendor gives him, or, rather, what he is able upon his title to give him, and the vendor will only be responsible for his own acts and incumbrances. Such I believe to be the general doctrine.

Now, the principal authorities upon the question before us are *Bree* v. *Holbech* (1), *Johnson* v. *Johnson* (2), *Cripps* v. *Reade* (3), and *Hitchcock* v. *Giddings*. (4) In addition to these, we have the high authority of one of the most eminent judges and writers upon the law of real property, viz. Lord St. Leonards. In *Bree* v. *Holbech* (1), the defendant, a personal representative, having found among the papers of the deceased a mortgage-deed for 1200*l*., assigned it to the plaintiff for a valuable consideration, the deed of assignment reciting that it was a mortgage-deed made or mentioned to be made between the mortgagor and mortgagee for that sum; and, after the lapse of six years, it was discovered that the supposed mortgage-deed was a forgery, and the purchaser thereupon brought money had and received to recover back the sum he paid for it. But Lord Mansfield said: "The basis of the whole argument is fraud. But here everything alleged in the replication may be true, without any fraud on the part of the defendant. He is an administrator with the will annexed, who finds a mortgage-

(1) 2 Doug. 654, a.
(2) 3 B. & P. 162.
(3) 6 T. R. 606.
(4) 4 Price, 135.

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deed among the papers of his testator, without any arrears of interest, and parts with it bonâ fide as a marketable commodity. If he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different. He did not covenant for the goodness of the title, but only that neither he nor the testator had incumbered the estate. It was incumbent on the plaintiff to look to the goodness of it." That is a distinct authority to shew that the purchaser must look to his covenant, and that the maxim caveat emptor applies. In *Johnson* v. *Johnson* (1) the purchaser was evicted for a defect of title after payment of the purchase-money, but before the conveyance was complete, and he was held to be entitled to recover back his money. Lord Alvanley thus expresses himself (2): "We by no means wish to be understood to intimate that, where under a contract of sale a vendor does legally convey all the title which is in him, and that title turns out to be defective, the purchaser can sue the vendor in an action for money had and received. Every purchaser may protect his purchase by proper covenants: where the vendor's title is actually conveyed to the purchaser, the rule caveat emptor applies." Nothing can be more specific than that. His Lordship goes on: "In the present case, the plaintiff never has had any title conveyed to him, and therefore we are of opinion, notwithstanding the party sued is a legatee, that the plaintiff has paid his money under a mistake: consequently, the rule adopted in Courts of law in such cases applies to him, and entitles him to recover that money from the party to whom it has been paid, in an action for money had and received." Lord St. Leonards, at p. 441 of the 13th edition of his book on Vendors and Purchasers, sums up the result of the authorities thus: "But, if the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity." For this he cites several cases in equity besides the cases I have already referred to. Not only have we the high authority of Lord St. Leonards for the doctrine I am adverting to, but the rule is substantially stated in the same terms in Dart's Vendors and Purchasers, 4th ed. p. 711. There is only one case which primâ

(1) 3 B. & P. 162. (2) 3 B. & P. at p. 170.

facie looks the other way, viz. *Hitchcock* v. *Giddings*. (1) There, a purchaser bought the supposed interest of the vendor in a remainder in fee expectant on an estate-tail, and it turned out that at the time of the contract the tenant in tail had suffered a recovery, of which both parties were ignorant until after the conveyance was executed and a bond given for securing the purchase money. The Court of Exchequer, in the exercise of its equitable jurisdiction, relieved the purchaser against the bond, on the ground of fraud. Lord Chief Baron Richards, in giving judgment, said: "This is certainly a charge of fraud; for, it is that the defendant, having no title to any interest in these estates at the time of the contract, bargained as if he had, and that thereby he prevailed on the plaintiff to give him this bond. Now, if a person sell an estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase-money, this is certainly a fraud, although both parties should be ignorant of it at the time; and that I believe to have been the case here. I must not be told that a Court of equity cannot interfere where there is no fraud shewn. If contracting parties have treated while under a mistake, that will be sufficient ground for the interference of a Court of equity: but in this case there is much more. Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact; am I to be allowed to receive 5000*l.* and interest, because the conveyance is executed and a bond given for that sum as the purchase-money, when in point of fact I had not an inch of the land so sold to sell? That was precisely the case with the present defendant, and it would be hard indeed if a Court of equity could not interfere to relieve the purchaser." The distinction between that case and the present is obvious,—there, the vendor was seeking to enforce performance of the contract by compelling the purchaser to pay for a thing he had not got; here, the plaintiff is calling upon the vendors to refund money which they honestly believed themselves to be entitled to when they received it. "Potior est conditio possidentis." It does not appear to me that that case interferes with the doctrine laid down by the high authorities I have referred to, which, regard being had to the usual course of conveyancing, seems to me to be just.

(1) 4 Price, 135.

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DENMAN, J. I am entirely of the same opinion; and, after the full judgment pronounced by my Brother Grove, I think it unnecessary to say more.

LORD COLERIDGE, C.J. I am of the same opinion. The rule is distinctly stated by Lord St. Leonards, and his conclusions are fully warranted by the cases before Lords Mansfield and Alvanley.

KEATING, J., concurred.

Rule discharged.

Attorney for plaintiff: *James Cooper.*
Attorney for defendants: *T. D. Bolton.*

Jan. 27.

WALROND *v.* HAWKINS.

Landlord and Tenant—Breach of Covenant not to underlet, &c.—Waiver by Acceptance of Rent—Continuing Breach.

A lease of a farm contained a covenant on the part of the lessee not to "assign or demise to or permit any other person to occupy the premises, or any part thereof, without the consent in writing of the lessor," and a proviso for re-entry by the lessor for any breach. By agreement in writing the lessee underlet a portion of the farm to one T. for one year from the 31st of January, 1873, and the lessor, on the 30th of September, 1873, with knowledge of the underletting, distrained for and received rent due on the 29th:—

Held, that the lessor had waived the breach of the covenant not to "assign or demise" without consent; and that the permitting T. to remain in the occupation of the land during the remainder of the year was not a new or continuing breach of the covenant not to "permit any other person to occupy" without consent.

EJECTMENT for a messuage called Perzwell, in the parish of Kentisbeare, in the county of Devon, upon an alleged forfeiture.

The particulars of breaches were twenty-one in number, as to the whole of which save the first the evidence failed. The first was as follows:—"Non-performance of the covenant not to assign, demise, or permit any other person to occupy the said premises without the consent in writing of the said B. Walrond, by having on the 25th day of March, 1869, or subsequently, assigned and demised to one W. Denham, or permitted the said W. Denham to occupy, certain parts of the premises comprised in the said lease,

and particularly the parts numbered 229, 721, and 768 in the tithe commutation map of the parish of Kentisbeare, to hold the same until the 25th of March, 1871, without the consent in writing of the said B. Walrond, or his assigns, for that purpose had and obtained."

The cause was tried before Keating, J., at the spring assizes, 1874, at Exeter. It appeared that the defendant became tenant of the farm in question under a lease from the plaintiff and another dated the 23rd of March, 1868, for twenty-one years from the 25th of March, 1869; the lease contained, amongst others, a covenant on the part of the lessee not to "assign or demise to or permit any other person to occupy the said premises, or any part thereof, without the consent in writing of the said B. Walrond, his heirs or assigns, for that purpose being first had and obtained;" and also a clause of re-entry for breach of any of the covenants therein.

By agreement of the 31st of January, 1873, the defendant agreed to let unto one John Trood "twelve cows and heifers, to be chosen by Trood of the cows and heifers Hawkins might have in his possession, without any allowance for the same, for one year, for the sum of 144*l.*," payable quarterly. "The said cows and heifers (if any) to be fed and depastured on the following fields or lands, viz. Rootings and Nodbere for summer leazes, Wellhead meadow for the mowing ground for the said cows, with the after grass until the 1st day of November next, then to be given up to Hawkins. Trood to have part of the lower house now let with the said cows, and also the Home Orchard to run his pigs in; only August, September, October, or reasonable time excepted for saving the apples; but no pigs to run in any part of the said dairy ground; and also to keep them well ringed." "Trood to keep the lead and glass of the windows, and leave in good repair." "Trood to have half an acre of ground for potatoes or turnips, the crop to be taken away by the 25th of December." "Hawkins reserves power to keep the dairy cows on any part of the summer leazes or any other ground after Christmas next, and also reserves power of ingress or egress with anything in any part of the said dairy ground. Trood to help make the dairy hay free of expense. No poultry to be kept without consent of Hawkins. Trood also

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hereby agrees that he and his son Thomas will work daily for Hawkins; their wages to be, for Trood himself 10*s.* per week, and for his son Thomas 5*s.* per week." "Trood hereby agrees to take the said cows or heifers and dwelling-house for the said term under the said yearly rent, subject to the terms, conditions, and restrictions and agreements before written."

Whilst Trood was in possession of the parts of the farm mentioned in this agreement, viz. on the 30th of September, 1873, the plaintiff distrained for the quarter's rent which became due on the 29th, and the defendant paid it. There was evidence that the plaintiff was at that time aware of Trood's occupation of the pasturage for the cows. This action was brought before the expiration of the year.

The learned judge, upon being referred to a case of *Burt* v. *Moor* (1), ruled that the allowing Trood to occupy a portion of the demised land and premises in the way described in the agreement was a breach of the covenant not to "assign, demise, or permit any other person to occupy," contained in the lease of the 23rd of March, 1868.

It was thereupon submitted on the part of the defendant, that, by the acceptance of rent under the distress, the plaintiff had waived the breach.

For the plaintiff it was insisted that, assuming that the plaintiff had waived the original breach, the subsequently allowing Trood to remain in occupation under the agreement was a continuing breach.

The jury found that the plaintiff was aware of the occupation by Trood at the time he received the Michaelmas rent.

The learned judge thereupon directed a verdict to be entered for the defendant; reserving leave to the plaintiff to move to enter the verdict for him on the first breach, if the Court should be of opinion that there was a continuing breach.

Cole, Q.C., in Easter Term, 1874, obtained a rule nisi to enter a verdict for the plaintiff, on the ground that the letting of the dairy dwelling-house, as proved, to Trood, was a breach

(1) 5 T. R. 329.

of covenant, and was not waived by the distress or acceptance of rent by the plaintiff. He referred to *Doe* d. *Ambler* v. *Woodbridge*. (1)

Kingdon, Q.C., and *Charles*, shewed cause. There was no doubt a letting in breach of the covenant: but it was known to the plaintiff at the time he distrained for and received payment of rent. The letting was for one year from the 1st of January, 1873; and the distress for the Michaelmas rent took place on the 30th of September, 1873, with full knowledge on the plaintiff's part of the terms of the letting. The breach of covenant was complete on the 31st of January, 1873: the continuance of the state of things created by that breach was not a new or continuing breach. It is not like the case of a covenant to repair the premises and to keep them in repair, or a covenant to insure and keep them insured, where there is a fresh breach every day the premises remain out of repair or uninsured. *Goodright* d. *Walter* v. *Davids* (2) is precisely in point. It was there held that, if a lessee covenants not to underlet without the consent of the lessor under hand and seal, with a power of re-entry in case of breach, acceptance by the lessor of rent due after the condition broken, with full notice, is a waiver of the forfeiture. And Lord Mansfield said: "The case is extremely clear. To construe this acceptance of rent due since the condition broken a waiver of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition, the landlord had a right to enter. He had full notice of the breach, and does not take advantage of it, but accepts rent subsequently accrued. That shews he meant the lease should continue. Cases of forfeiture are not favoured in law; and, where the forfeiture is once waived, the Court will not assist it." In *Doe* d. *Ambler* v. *Woodbridge* (1), the covenant was that the tenant "should not alter, convert, or use the rooms then used as bed-rooms, or either of them, into or for any other use or purpose than bed or sitting-rooms for the occupation of himself, his executors, &c., or his or their family, without the licence of the lessor in writing"; and the lease contained a clause of forfeiture for breach of any covenant.

(1) 9 B. & C. 376, (2) 2 Cowp. 803.

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The breach complained of was that the tenant had let part of the house to a lodger who occupied up to the time of the trial the rooms specified in the covenant: but the lessor had, after he knew of such occupation, received rent under the lease. Lord Tenterden ruled that "there was a continuing breach as long as the rooms were occupied contrary to the covenant:" and the Court sustained his ruling, saying: "The conversion of a house into a shop is a breach complete at once, and the forfeiture thereby incurred is waived by a subsequent acceptance of rent. But this covenant is, that the rooms shall not be used for certain purposes. There was, therefore, a new breach of covenant every day during the time that they were so used, of which the landlord might take advantage." The tenant there might at any time have ceased using the rooms in the prohibited manner: here, he could not determine Trood's occupation until the end of the year. In *Doe* d. *Flower* v. *Peck* (1) the breach was not insuring, pursuant to a covenant: and it was held that, though a distress for rent (with knowledge) was an acknowledgment of a tenancy and a waiver of the forfeiture to that time, yet a continuing omission to insure was a fresh breach. Parke, J., in delivering the judgment of the Court, takes this distinction (2): "If this could be construed to be a covenant by the lessee to effect one policy of insurance immediately, and afterwards that he and his assigns should keep that particular policy on foot by continuing to pay the annual premiums on that policy, the assignee would not have been guilty of any breach of covenant if the lessee had never insured, for the policy never could have existed which the assignee was to continue; and the distress for rent would have been a waiver of the breach by the original lessee. But, if the covenant mean that the lessee and his assigns shall always keep the premises insured by some policy or another, then it is broken if they are uninsured at any one time; there is a continuing breach for any portion of time that they remain uninsured: and we are of opinion that this is the true construction of the covenant." Here, the breach of covenant was the act of letting a portion of the demised premises for one year. The mere continuance of that

(1) 1 B. & Ad. 428. (2) 1 B. & Ad. at p. 438.

state of things after the waiver by acceptance of rent did not amount to a fresh breach.

Cole, Q.C. (*Lopes, Q.C.*, and *H. Clarke*, with him), in support of the rule. The words of the covenant are, that the lessee shall not "assign or demise to or *permit any other person to occupy* the said premises, or any part thereof, without the consent in writing of the lessor," &c. Assuming that the demise to Trood was condoned by the subsequent acceptance of rent, the "permitting him to continue in the occupation of" the dairy house and land was a distinct breach, by which the lessee incurred a forfeiture. It is impossible to distinguish *Doe* d. *Ambler* v. *Woodbridge* (1) from the present case.

[GROVE, J. The tenant did not let the dairy house, but assigned for a definite time by an underlease. The question is whether the continued occupation by the sub-lessee after a waiver of that breach is a continuing breach.]

All the plaintiff knew was that there was an underletting.

[LORD COLERIDGE, C.J. The finding of the jury is, that "the plaintiff was aware of *the* occupation of Trood at the time he distrained."]

In *Doe* d. *Muston* v. *Gladwin* (2), A. demised premises to the defendant upon a lease containing a covenant by the tenant to insure and continue insured the buildings, &c., in the joint names of the landlord and tenant. In May, 1827, A.'s interest was assigned to B., who, on the 13th of January, 1843, assigned to the plaintiff. The defendant in 1836 insured the premises in his own name only, and kept the policy on foot by payment of premiums till the 27th of December, 1842, when the last premium was paid, being for the ensuing year. In 1839 the policy effected in 1836 was shewn to B., who acquiesced in the form of it; and on the 12th of January, 1843, B. received the rent due at Christmas, 1842. In ejectment upon a demise laid in May, 1843, it was held that though, by the acquiescence of B. in the form of the policy, and by receipt of rent up to Christmas, 1842, there was a waiver by him of the breach of covenant up to Christmas, 1842, yet that, as the covenant was continuing, the non-compliance with the lease

(1) 9 B. & C. 376. (2) 6 Q. B. 953.

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in respect of the insurance subsequently to that period entitled the plaintiff to re-enter for the forfeiture. Patteson, J., in delivering judgment, relies upon *Doe* d. *Flower* v. *Peck.* (1)

[GROVE, J. The ratio decidendi in *Doe* d. *Muston* v. *Gladwin* (2) is, that a breach of contract cannot be waived by a parol licence to break it.

DENMAN, J. Waiver is a question of mind and intention, not a pure question of law.]

There is a continuing duty here not to continue to permit any one to occupy any part of the demised premises, and a continuing breach of that duty; like the breach of a condition in a licence to mine, that the licence was to become void if the grantee should neglect to work the mines for a certain time: *Roberts* v. *Davey* (3): and see *Doe* d. *Griffith* v. *Pritchard.* (4)

LORD COLERIDGE, C.J. I am of opinion that this rule should be discharged. The sole question before us arises upon the construction of a few words in a lease, coupled with the finding of the jury. The plaintiff is seeking to take advantage of a forfeiture by reason of the breach of a covenant on the part of the defendant "not to assign or demise to or permit any other person to occupy the demised premises, or any part thereof, without the consent in writing of the lessor," &c. It appeared that the defendant did without consent demise a portion of the premises to one Trood for a year; and he thereby was unquestionably guilty of a breach of that covenant. The question is whether the right to re-enter for that breach has been waived. The demise from the defendant to Trood was dated the 31st of January, 1873; and whilst that lease was existing, viz. on the 30th of September, 1873, the plaintiff distrained for and accepted rent due on the 29th. The jury found that the lessor intended to waive and did waive the breach of the covenant not to demise, by accepting rent with knowledge of the underletting. I am of opinion that the acceptance of rent under the circumstances was a waiver. The covenant must be read distributively,—that the lessee will not assign, or

(1) 1 B. & Ad. 428.
(2) 6 Q. B. 953.
(3) 4 B. & Ad. 664.
(4) 5 B. & Ad. 765.

(without assigning or demising) permit another to occupy any part of the demised premises; and not, as Mr. Cole contends, as one entire covenant. To hold that every day's occupation by Trood, although the defendant could not himself occupy during the remainder of the year, was a continuing breach, would be a most unreasonable construction of the covenant. None of the cases cited by Mr. Cole are directly in point. The two cases which come nearest to the present are *Doe* d. *Ambler* v. *Woodbridge* (1) and *Doe* d. *Muston* v. *Gladwin*. (2) In the former, the plaintiff was allowed to recover because after the waiver of the breach by the first letting there was a continuance of the breach by allowing the rooms to be used contrary to the covenant, when the lessee might have prevented it. *Doe* d. *Muston* v. *Gladwin* (2) was a very hard case; and the Court gave force to the objection with very great reluctance. The covenant was that the lessee, his executors, &c., would insure and continue insured in the joint names of himself, his executors, &c., and the lessor, his executors, &c. That covenant was never performed, the lessee having insured in his own name only. In January, 1843, the original lessor (who had received rent after notice of the informal nature of the policy) assigned his interest to the plaintiff, who brought ejectment against the lessee for not insuring according to his covenant. In giving judgment, Patteson, J., says (3): "There is nothing but verbal evidence that a landlord had said that he would be satisfied though the covenant should be broken, which it indisputably was during the whole time that the premises remained uninsured contrary to the covenant; for the waiver by acceptance of rent could not operate beyond Christmas, up to which period that rent was accepted; and, this being a continuing covenant, a subsequent breach entitled the lessor of the plaintiff to re-enter." Assuming that case to have been well decided, it is by no means this case. There was a possibility of the state of things being altered at any moment by the person proceeded against: he might have got the form of the policy altered: failing to do so, he was guilty of a continuing breach or of a repetition of the breach day by day so

(1) 9 B. & C. 376. (2) 6 Q. B. 953.
(3) 6 Q. B. at p. 963.

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long as the covenant was uncomplied with. Here, however, there was but one single breach. The lessee could not determine the tenancy of Trood until the 31st of January, 1874: and the lessor, with full knowledge of the state of things, accepted rent. *Goodnight* d. *Walter* v. *Davids* (1) is directly in point. There, a lessee who was under covenant, as here, not to underlet without consent, made an underlease for a year, and the forfeiture was held to be waived by a single acceptance of rent by the lessor with knowledge of the breach. "To construe this acceptance of rent due since the condition broken and waiver of the forfeiture," said Lord Mansfield, "is to construe it according to the intention of the parties. Upon the breach of the condition, the landlord had a right to enter. He had full notice of the breach, and does not take advantage of it, but accepts rent subsequently accrued. That shews he meant the lease should continue." Those reasons are directly applicable here. Knowing of the demise for a year to Trood, the plaintiff, by his acceptance of rent, sanctions the continuance of that state of things for the year. If that case was rightly decided, à fortiori the conclusion I have arrived at in this case is right also. My Brother Denman has called my attention to a case of *Doe* d. *Gatehouse* v. *Rees* (2), where it was held that a forfeiture of a lease accruing on the lessee's insolvency was waived by acceptance of rent from him after his discharge under the Insolvent Debtors Act; and that the non-payment of a debt specified in his schedule to be due to the lessor was not a continual (general) insolvency, to constitute a new forfeiture after such acceptance of rent. That case seems to me to have a material bearing upon this. I think the direction of my Brother Keating was right, and that this rule must be discharged.

GROVE, J. I am of the same opinion. The lessee was clearly guilty of a breach of covenant by under-letting a portion of the premises for a year; but that breach was waived by the subsequent acceptance of rent with knowledge of that letting. Knowing that the dairy premises were let to Trood for a year, the lessor affirms that state of things, and therefore the case is distinguish-

(1) 2 Cowp. 803. (2) 4 Bing. N. C. 384.

able from *Doe* d. *Ambler* v. *Woodbridge* (1), where, the lessee, having power to discontinue the unauthorized occupation of the rooms, allowed such unauthorized use of them to continue, and thereby committed a fresh breach of his covenant. Neither is the case within *Doe* d. *Muston* v. *Gladwin* (2), where a parol waiver of a breach of a covenant to insure in the joint names of lessor and lessee, by acceptance of rent by the lessor, with notice that the policy had been effected in the name of the lessee only, was held not to estop an assignee of the lessor from complaining of the unauthorized form of the insurance.

DENMAN, J. I also am of opinion that the rule should be discharged. I think the case is governed by *Goodright* d. *Walter* v. *Davids*. (3) The difficulty which exists here did not arise there. The tenant could not put an end to Trood's occupation until the expiration of the year. For the reasons given by my Lord, I think *Doe* d. *Ambler* v. *Woodbridge* (1) has no application. The breach there complained of was a renewed act every week during which the sub-letting took place. In *Doe* d. *Muston* v. *Gladwin* (2) there had been a succession of landlords from time to time. Oliver, who became assignee of the reversion in 1837, had for several years sanctioned the form of policy of which the lessor of the plaintiff complained, by the acceptance of rent down to Christmas, 1843. It was contended on the part of the defendant that the forfeiture thus waived by Oliver could not be enforced by the lessor of the plaintiff (who had acquired his interest by assignment), at all events until after express notice to insure according to the covenant. Watson and Peacock, in shewing cause, urged two arguments,—first, that the covenant to insure and keep insured was a continuing covenant, and therefore a waiver of forfeiture by Oliver in 1839 did not extend to subsequent forfeitures,—secondly, that the supposed assent, if it went further than the waiver of a past breach, must be relied upon as a parol dispensation with a contract under seal, which is contrary to the established rule of law. The judgment of the Court seems to me

(1) 9 B. & C. 376. (2) 6 Q. B. 953.
(3) 2 Cowp. 803.

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to amount to this,—that, though Oliver might be bound by the principle laid down in *Pickard* v. *Sears* (1) and that class of cases, the lessor of the plaintiff was not estopped from insisting upon the performance of the covenant. That appears to me to be clear from the argument on the other side, in the course of which Patteson, J., observes, "You do not put the landlord's conduct as a dispensation; and yet you assert what clearly amounts to one,—an engagement by the landlord that as long as the premiums are paid he will not enforce the covenant." In giving judgment, the learned judge, after referring to the conduct of Oliver, says (2): "Under these circumstances, this ejectment must be considered as unusually harsh; and it is impossible for any Court to lend itself willingly to enforce the proceeding. The expression that the law abhors a forfeiture was never more appropriate. But we must not forget that the legal rights of parties are all that we have power to deal with." Further, he says (3): "Since this lease, then, contains a proviso for re-entry in case of a breach of this covenant as well as that of others which may be thought more important, we have only to inquire whether it has been broken so that the landlord might maintain an action of covenant for the breach. That it has been broken is unquestionable; but the present landlord is said to be bound by the act of the former, who gave the defendant to understand that he should not require the performance of the covenant, but was satisfied with the substitution of a different mode of insuring. The case was likened to *Pickard* v. *Sears* (1) and to some others, where it was held that a party may by his conduct so mislead another and so affect his interests as to deprive himself of the right to complain of what was afterwards done under an impression which he himself had produced; and a recent case of *Doe* d. *Pittman* v. *Sutton* (4) was particularly brought forward. It seems, however, sufficient to observe that no case has gone to the length of intimating that a breach of covenant can be justified by a parol licence to break it." That means that no case has gone the length of holding that the parol licence would be good as against a subsequent landlord. Then, after

(1) 6 A. & E. 469.
(2) 6 Q. B. at p. 961.
(3) 6 Q. B. at p. 962.
(4) 9 C. & P. 706.

distinguishing *Doe* d. *Pittman* v. *Sutton* (1) and *Doe* d. *Knight* v. *Rowe* (2), the learned judge continues,—"But, in this case, there is nothing but verbal evidence that a landlord has said that he would be satisfied though the covenant should be broken, which it indisputably was during the whole time that the premises remained uninsured according to the covenant; for, the waiver by acceptance of rent could not operate beyond Christmas, up to which period that rent was accepted; and, this being a continuing covenant, a subsequent breach entitled the lessor of the plaintiff to re-enter: *Doe* d. *Flower* v. *Peck.* (3)" I cannot help thinking that all that was intended to be decided in that case was, that, though the original landlord was estopped, the present landlord was not. I think it important that the decision should not be supposed to go further than it really does. At all events, it is not in point here.

KEATING, J., concurred.

Rule discharged.

Attorney for plaintiff: *H. Samber, for F. Burrow, Collumpton, Devon.*

Attorneys for defendant: *Church, Sons, & Clarke, for T. R. Densham, Bampton, Devon.*

(1) 9 C. & P. 706. (2) R. & M. 343.
(3) 1 B. & Ad. 428.

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Feb. 12.

[IN THE EXCHEQUER CHAMBER.]

COLE AND ANOTHER *v.* THE NORTH WESTERN BANK.

Factors Acts—Agent "intrusted with the Possession of Goods," within 5 & 6 *Vict. c.* 39*—Agent a Broker and also a Warehouse-keeper, and Goods delivered to him in the latter Capacity.*

A warehouse-keeper who has goods deposited with him as such is not "an agent intrusted with the possession" of them, within the Factors Act, 5 & 6 Vict. c. 39, although he be also a broker, and is usually employed to sell the goods, but always upon specific instructions for that purpose received from the principal.

One Slee carried on the business of a sheep's wool broker in Liverpool, and also that of a warehouse-keeper. In his capacity of warehouse-keeper he was in the habit of receiving from the plaintiffs, merchants in London, bills of lading for sheep's wool and goats' wool to arrive in Liverpool, which when landed was deposited in his warehouses, under directions to send the plaintiffs a report and valuation, but he was not authorized to sell without specific instructions. The sheep's wool so deposited with him was usually sold by Slee, and the proceeds received by him for the plaintiffs. The goats' wool Slee never sold, he not being a goats' wool broker.

Having wools of the plaintiffs of both descriptions in his warehouse, but not having received any instructions as to the sale of either, Slee professed to pledge the whole with the defendants, bankers in Liverpool, by a letter in which he undertook to hold them as trustee for the defendants, to secure the sum advanced:—

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that Slee was not, as to any of the wools so agreed to be pledged, "an agent intrusted with the possession," within the Factors Act, 5 & 6 Vict. c. 39.

Per Blackburn, J.:—The intention of the Factors Act, 5 & 6 Vict. c. 39, was, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges them, he should be deemed by that act to have misled any one who bonâ fide deals with the agent, and makes a purchase from or an advance to him without notice that he was not authorized to sell the goods or to procure the advance.

Per Bramwell, B.:—The statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed.

ERROR upon a judgment of the Court of Common Pleas for the plaintiffs on a special case: Law Rep. 9 C. P. 470.

Feb. 4. *Benjamin, Q.C.* (*R. G. Williams, Q.C.*, and *Gorst*, with him), for the defendants, contended that an agent intrusted with the possession of goods, and having an ostensible authority to deal

with them as owner, might, even at common law, and independently of the Factors Acts, confer a good title upon a vendee or pledgee,—*Pickering* v. *Busk* (1); that the fair inference from the facts stated in the special case was, that Slee was intrusted with the wools in question as a wool-broker, and not as a mere warehouse-keeper (the making of a valuation and report being no part of the duty of a warehouse-keeper), and, though his principals reserved to themselves the right to dispose of them themselves, still it was his usual course of business to sell the sheep's wool at all events and to receive the proceeds, and therefore he appeared to the world as the consignee and owner of the wools, notwithstanding any secret orders to await instructions as to the disposal of them; and that, at all events, he was an agent "intrusted with the possession" of the wools, within the Factors Act, 5 & 6 Vict. c. 39; for, that, if one who ordinarily sells as agent is intrusted with the possession of goods for any purpose, he would have authority to pledge them, and his principals would be bound by his act. And, after an elaborate review of the general policy of the earlier Factors Acts, 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94, and of the progressive changes from time to time effected in the law with regard to the relations between principal and factor, and a criticism of the various decisions which led to those changes, he submitted that the only inference that could reasonably be drawn from the statements in the case was, that Slee's position was such at the time of the pledge made by the letter of the 5th of April, 1872, as to make such pledge valid as against his principals, the plaintiffs. He referred to *Phillips* v. *Huth* (2); *Hatfield* v. *Phillips* (3); *Monk* v. *Whittenbury* (4); *Fuentes* v. *Montis* (5); *Baines* v. *Swainson* (6); *Lamb* v. *Attenborough* (7); *Navulshaw* v. *Brownrigg* (8); relying especially upon the judgment of Lord Westbury in the case of *Vickers* v. *Hertz*. (9) As to the second point argued in the Court below, viz. that, at the time of the pledge, Slee had not posses-

(1) 15 East, 38.
(2) 6 M. & W. 572.
(3) 9 M. & W. 647; 12 Cl. & F. 343.
(4) 2 B. & Ad. 484.
(5) Law Rep. 3 C. P. 268; Law Rep. 4 C. P. 93.
(6) 4 B. & S. 270; 32 L. J. (Q.B.) 281.
(7) 1 B. & S. 831; 31 L. J. (Q.B.) 41.
(8) 2 De G. M. & G. 441; 21 L. J. (Ch.) 908.
(9) Law Rep. 2 H. L., Sc. 113.

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sion of all the wools, *Langton* v. *Waring* (1) and *Portales* v. *Tetley* (2) were cited.

Feb. 5. *Herschell, Q.C.* (*W. G. Harrison* with him), contrà, contended that an agent had no authority at common law to bind the property of his principal by a pledge; that the present case was neither within the mischief nor the words of the Factors Acts; that the defendants were not induced to advance the money upon the faith of Slee's possession or ostensible ownership of the goods, but acted upon his representation that he had them in his hands; that the fact of the wools having been deposited with Slee as a warehouseman did not give him authority under 5 & 6 Vict. c. 39 to bind his principals by a pledge of them; that, to give him such authority, it must appear that he was intrusted with the possession of the goods as agent for sale, or at least that it was the course of his business as such agent to sell; that the slightest inquiry on the part of the defendants would have disclosed the limited authority under which Slee held the wools; that the transaction of the 5th of April, 1872, did not amount to a pledge, but at the most to a mere contract or agreement to pledge, which might have been defeated by the principals getting back their goods before the transaction was completed; that the defendants could gain no title as against the plaintiffs by their wrongful act in forcibly possessing themselves of the wools in the manner disclosed by the case; that, as to the goats' wool, Slee was clearly never intrusted with them as broker at all; and that, as to the 114 bales of sheep's wool ex *Grecian*, they could not be the subject of a pledge by Slee, inasmuch as they were not in his hands at the time, and he did not profess to pledge the bills of lading, which were. He cited and commented upon the provisions of the Factors Acts, and also the following authorities,—*Wilkinson* v. *King* (3); *Pickering* v. *Busk* (4); *Monk* v. *Whittenbury* (5); *Baines* v. *Swainson* (6); *Fuentes* v. *Montis* (7); and contended that the dictum of Lord Westbury in *Vickers* v. *Hertz* (8) was

(1) 18 C. B. (N.S.) 315.
(2) Law Rep. 5 Eq. 140.
(3) 2 Camp. 335.
(4) 15 East, 38.
(5) 2 B. & Ad. 484.
(6) 4 B. & S. 270; 32 L. J. (Q.B.) 281.
(7) Law Rep. 2 C. P. 268; 4 C. P. 93.
(8) Law Rep. 2 H. L., Sc. 113.

founded upon a mistaken notion of the effect of the judgment of Willes, J., in the last-mentioned case.

Benjamin, Q.C., in reply, referred to *Higgons* v. *Burton*. (1)

Cur. adv. vult.

Feb. 12. BLACKBURN, J. This is a special case on which the Court of Common Pleas gave judgment for the plaintiffs for the sum of 6661*l.* 1*s.* 7*d.* The defendants brought error on that judgment, and the case was argued in the Exchequer Chamber on the 4th and 5th of February last, by Mr. Benjamin for the defendants (the plaintiffs in error) and Mr. Herschell for the plaintiffs (the defendants in error), before my Brothers Bramwell, Mellor, Lush, Cleasby, Pollock, and Amphlett, and myself, when we took time to consider.

The case was stated without pleadings. It did not as originally drawn give express power to the Court to draw inferences of fact: but, on that being pointed out during the argument, it was agreed that it was so intended, and that, if necessary, an amendment should be made, to give that power.

The plaintiffs, merchants in London, were the owners of two parcels of sheep's wool, and two parcels of mohair or goats' wool. All four parcels were received for the plaintiffs by one Slee, a warehouseman and sheep's wool broker at Liverpool, and were by him deposited in his warehouse at Liverpool. From thence they were taken on the 13th of April, 1872, by the defendants, who claimed right so to do under a contract made by Slee on the 5th of April, 1872, by which he pledged, or agreed to pledge, the whole four parcels to the defendants for 7000*l.* then advanced to him by the defendants on that security.

At the time when this contract was made, the two parcels of goats' wool and one of the parcels of sheep's wool were in Slee's warehouse. The other parcel of sheep's wool was still on board the vessel (the *Grecian*) by which it had come: but Slee held the bill of lading, which had been sent to him by the plaintiffs to enable him to land and deposit the wool in his warehouse; and (after the making of the contract of the 5th of April) on the 9th of April this sheep's wool also was actually deposited in the warehouse.

(1) 26 L. J. (Ex.) 342.

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Slee absconded with the 7000*l.* thus obtained, and then the defendants, having notice that Slee had committed this act of bankruptcy, but not having any further notice that he had not been so intrusted with the possession of the goods as to be able to pledge them, took forcible possession of the whole goods against the will of Slee's clerks.

The great question was whether Slee was, under the circumstances, so intrusted with the possession of the goods as to have been able on the 5th of April (supposing he had then delivered actual possession to the defendants) to make a pledge to the defendants good against the plaintiffs. As to this, there is a distinction between the sheep's wool and the goats' wool; for, Slee never sold goats' wool at all, and was clearly intrusted with the goats' wool as warehouseman, and as warehouseman only. But he did sell sheep's wool as a broker.

A broker, who, without being intrusted with the goods, makes a contract between two principals, has no opportunity to pledge the goods at all. But we know (though it is not stated in the case) that brokers often are capitalists who make advances on the goods and have them transferred into their names as a security for such advances. And sometimes, especially where the principal is resident at a distance, the goods are transferred into the broker's name for the purpose of facilitating a sale by him, although there has been no advance made by him upon them. The agent thus intrusted is something more than a mere broker.

A pledge by a person thus intrusted with the possession of goods as broker would no doubt be good. And if, as is sometimes the case, the broker had warehouses of his own in which the goods so intrusted to him were stored, they would be equally in his possession as broker as if they had been stored in the warehouse of another in his name. But we are all agreed that we must understand from the statement in the case that Slee had not warehouses as merely ancillary to his business as broker, but that he carried on two distinct and independent businesses, the one being that of a warehouseman, the other that of a sheep's wool broker: and this raises the first question of fact, viz. whether the goods in question were intrusted to him merely as warehouseman, or also as broker.

It is stated in the case that the bills of lading of the plaintiffs' wool (whether goats' wool or sheep's wool) were in the ordinary course of business sent down to Slee for the purpose of his receiving the wool from the ship and warehousing it. Slee, after the wool had been so received and warehoused, sent up a report and valuation thereon, and then awaited the plaintiffs' further instructions as to disposal. Two sample letters are set out in the Appendix, one relating to goats' wool, the other to sheep's wool; and they bear out the statement in the case that both kinds of wool were treated in exactly the same way.

But there is the further statement that, "as to the sheep's wool, Slee had no general authority from the plaintiffs to sell, but always awaited instructions, and acted only under specific authority given to him from time to time in each case; and, when such last-mentioned sales were effected, Slee received the proceeds."

We draw the inference of fact that, as between the plaintiffs and Slee, Slee was intrusted with the sheep's wool and goats' wool alike, solely for the purpose of warehousing them. But, as it appears that he was sometimes authorized by the plaintiffs to sell and receive payment for sheep's wool deposited in his warehouse, the question arises whether he could make to the defendants a good pledge of any wool (either goats' wool and sheep's wool, or of sheep's wool only, or of neither,) deposited by the plaintiffs in his warehouse, though not intended to be sold.

The Court of Common Pleas decided that the pledge (even supposing it to have been executed by delivery on the 5th of April) would not have been good either as to the sheep's wool or the goats' wool: and we are of opinion that they were right, and that their judgment should be affirmed.

This renders it unnecessary for us to express any opinion on two subsidiary points raised by Mr. Herschell,—first, that the taking forcible and (as he argued) wrongful possession on the 13th of April could not better the defendants' position, who therefore remained in the position (provided for in the 4th section of 5 & 6 Vict. c. 39) of a person who has made a contract for a pledge with an agent, but has not actually received the goods contracted to be pledged,—and, secondly, as to the parcel per *Grecian*,

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that Slee on the 5th of April, when the contract was made, was not in possession of these wools, though he had the bill of lading under which he subsequently obtained them. We merely mention these two points, to shew that we have not overlooked them; but express no opinion on either.

The decision of this case depends, in our opinion, entirely on the true construction of the last of the Factors Acts, 5 & 6 Vict. c. 39, which was passed to amend and extend the earlier Factors Acts, 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94. We think, however, that, in order to understand 5 & 6 Vict. c. 39, it is necessary to consider what was the common law before any legislation on the subject, what were the provisions of the two earlier Acts, and what had been the judicial decisions upon them.

The amount at stake in the present action is large, and renders our decision of importance to the parties. But the general importance of the question as regards the commerce of this country is even greater. It was for this reason, and not from any doubt as to what the decision should be, that the Court took time to consider their judgment. And for the same reason we now proceed to give our reasons at some length.

The 4th edit. of Abbott on Shipping was published before the passing of either of the Factors Acts. The 5th edit., the last published in the lifetime of the author, was published before the passing of 5 & 6 Vict. c. 39: but it contains a valuable abstract of the two earlier Factors Acts, indicating what Lord Tenterden thought was their effect. The passage containing his opinion has been suppressed in the sixth and subsequent editions of Abbott on Shipping. The 5th edition, in which alone it is to be found, is now out of print: it is worth while, therefore, to quote the whole passage at length: it will be found in part 3, ch. 9, s. 16, p. 381:—

"Lastly, we are to consider by what acts the right of the consignor may be taken away before the end of the transit. Since the publication of the former editions of this book, this subject has received the attention of the legislature, and Acts of Parliament have passed (1) by which the matter will in many cases be governed in future. The legislative enactments are in part con-

(1) 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94.

firmatory of the common law, and in part important alterations of it. The following abstract of them will, it is hoped, be found correct and useful.

"The person in whose name goods are shipped is to be deemed the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money or negotiable security advanced by him to such person, or received by such person to his use, if he has not notice by the bill of lading or otherwise, at or before the advance or receipt, that such person is not the actual and bonâ fide owner of the goods; and such person shall be taken for the purposes of the Act to have been intrusted with the goods for the purpose of consignment or of sale, unless the contrary be made to appear. (1) So, also, a person intrusted with and in possession of a bill of lading, or of any of the warrants, certificates, or orders mentioned in the Act, is to be deemed the true owner of the goods described therein, so far as to give validity to any contract or agreement made by him for the sale or disposition of the goods or the deposit or pledge thereof, if the buyer, disponer, or pawnee has not notice, by the document or otherwise, that such person is not the actual and bonâ fide owner of the goods. (2) But, if such person deposit or pledge the goods as security for a pre-existing debt or demand, he who so takes the deposit or pledge without notice shall acquire such right, title, or interest, and no further or other, than was possessed by the person making the deposit or pledge. (3) And, further, any person may contract for the purchase of goods with any agent intrusted with the goods, or to whom they may be consigned, and receive and pay for the same to the agent, notwithstanding he shall have notice that the party with whom he contracts is an agent, if such contract and payment be made in the ordinary and usual course of business, and he has not at the time of the contract or payment notice that the agent is not authorized to sell or to receive the price. (4) Also, any person may accept any goods, or any such document as aforesaid, on deposit or pledge from any factor or agent, notwithstanding he shall have notice that the party is a factor or agent; but, in such case, he shall acquire such right, title, or interest, and no further

(1) 6 Geo. 4, c. 94, s. 1.
(2) 6 Geo. 4, c. 94, s. 2.
(3) 6 Geo. 4, c. 94, s. 3.
(4) 6 Geo. 4, c. 94, s. 4.

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or other than was possessed by the factor or agent at the time of the deposit or pledge. (1)

"It is, however, provided that the Act shall not prevent the true owner of the goods from recovering them from his factor or agent before a sale, deposit, or pledge, or from the assignees of such factor or agent, in the event of his bankruptcy; nor from the buyer the price of the goods, subject to any right of set-off on the part of the buyer against the factor or agent; nor from recovering the goods deposited or pledged, upon repayment of the money or restoration of the negotiable instrument advanced on the security thereof to the factor or agent: and upon payment of such further money or restoration of such other negotiable instrument (if any) as may have been advanced by the factor or agent to the owner, or on payment of money equal to the amount of such instrument; nor from recovering from any person any balance remaining in his hands as the produce of a sale of the goods after deducting the money or negotiable instrument advanced on the security thereof. And, in the case of the bankruptcy of the factor or agent, the owner of the goods so pledged and redeemed shall be held to have discharged pro tanto his debt to the estate of the bankrupt. (2)

"I am not aware that any case has hitherto been decided upon the construction of these enactments. They appear, as I have before observed, to be partly a confirmation and partly an alteration of the law: and, as a knowledge of the former state of the law is often very useful, even after an alteration has been made, it has been thought advisable to retain the contents of the last edition on this subject, with a reference to some subsequent decisions."

We agree with Lord Tenterden in thinking that these acts were partly a confirmation and partly an alteration of the law, and that, to understand them, it is necessary to see what the law was before they were passed.

At common law, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of

(1) 6 Geo. 4, c. 94, s. 5. (2) 6 Geo. 4, c. 94, s. 6.

fraud. But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shewn that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced bonâ fide to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited.

And the possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves. The transfer of a bill of lading for goods in transitu had the same effect in defeating the unpaid vendor's right to stop in transitu that an actual delivery of the goods themselves under the same circumstances would have had. But the transfer of the document of title by means of which actual possession of the goods could be obtained, had no greater effect at common law than the transfer of the actual possession.

Lord Tenterden thus states the law (1): "If the goods were sent to the consignee as a factor, it was thought that his possession of the bill of lading could not in reason give him any greater power over the goods before their arrival than his actual possession of them afterwards would do: and as, in the case of actual possession, although a factor might sell the goods and thereby bind his principal because his employment and authority are to sell, but could not pawn or pledge them because he is not by his employment authorized so to do, so, before the arrival of the goods, it was held that he could not divest the consignor's right to stop them by indorsing or delivering over the bill of lading as a pledge."

The proposition that a factor is not by his employment authorized to pawn or pledge goods intrusted to him, was for many years much controverted in point of fact. But, it having once been decided as a matter of law that he was not so authorized, the Courts adhered to what had been decided.

(1) Abbott on Shipping, 5th edit., part 3, ch. 9, s. 19, p. 391.

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The law in this respect has been altered by 5 & 6 Vict. c. 39, as will be shewn hereafter: but the legislature did not alter it in the first Factors Act, 4 Geo. 4, c. 83, except in the case of consignments by sea. In *M'Combie* v. *Davies* (1), the decision went so far as to hold that a pledge by a factor was so totally tortious as not even to transfer the lien which the pledgor himself had. This decision is made no longer law by the earlier Factors Acts.

The general principle of law, that, where the true owner has clothed any one with apparent authority to act as his agent, he is bound to those who deal with the apparent agent on the assumption that he really is an agent with that authority, to the same extent as if the apparent authority was real, is illustrated by two decisions which probably were present to the minds of those who framed 6 Geo. 4, c. 94. In *Wilkinson* v. *King* (2), it appeared that one Ellit was a wharfinger, and was accustomed to sell lead from his wharf. It is not distinctly stated in the report whether these sales were solely of his own lead or also of lead sent to him by others to sell as their factor; but, as it is expressly mentioned that he had never sold any lead for the plaintiff, it appears probable that he sold for others as factor. The defendant bonâ fide bought from Ellit lead belonging to the plaintiff which had been sent to him as wharfinger only. Lord Ellenborough ruled that "Ellit had no colour of authority to sell the lead, and no one could derive title from such a tortious conversion." And several other cases depending on similar sales by Ellit were decided in 1809 and 1810 in the same way. In none of these does there appear to have been any attempt to review in banc the decisions at nisi prius. In *Pickering* v. *Busk* (3), in 1812, the plaintiff, the true owner, had purchased the goods through Swallow, who pursued the public business of broker and an agent for sale, and the goods were at the plaintiff's desire transferred into the name of Swallow. It was held that this proved that Swallow had an implied authority to sell, and consequently that the defendants were justified in buying of Swallow and paying him the price. Lord Ellenborough goes somewhat further. He says: "If a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed

(1) 7 East, 5. (2) 2 Camp. 335. (3) 15 East, 33.

that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by his principals in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not." It is to be observed, however, that the other judges base their judgment on the ground that the circumstances proved in fact an implied authority to Swallow to sell; and that Lord Ellenborough limits his more extensive doctrine to the case of a person "authorizing another to assume the apparent right of disposing of property in the ordinary course of trade," or, in other words, intrusting it to an agent whose business it is to sell: and, on *Wilkinson* v. *King* (1) being cited on the argument, he says (2): "That was the case of a wharfinger whose proper business it was not to sell, and to whom the goods were sent for the mere purpose of custody:" from whence it may be inferred that he limited his general doctrine to cases in which, as in that before him, the goods were intrusted to an agent whose ordinary business it was to sell, in the course of his business as such agent, and because he was such agent. And Le Blanc, J., expressly says (3): "This is distinguishable from all the cases where goods are left in the custody of persons whose proper business it is not to sell."

Perhaps, however, the case of *Dyer* v. *Pearson* (4), which was decided in 1824, the year before the passing of 6 Geo. 4, c. 94, is that which throws most light on the intention of the legislature. That was trover for wool. Smith, who had sold the wool to the defendant, had been intrusted by the plaintiffs with the bill of lading, for the purpose of warehousing the goods, which he did in his own name. There was no distinct evidence that Smith was in the habit of buying or selling wool for others; and this was relied on in the argument as distinguishing the case from *Pickering* v. *Busk* (5), which was not questioned; and it was not contended

(1) 2 Camp. 335.
(2) 15 East, at p. 42.
(3) 15 East, at p. 45.
(4) 3 B. & C. 38.
(5) 15 East, 38.

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that he in fact had any authority from the plaintiffs to sell. Abbott, C.J., had at the trial left the question to the jury whether the defendant had purchased the wool under circumstances which would have induced a cautious man to believe that Smith had authority to sell. The jury found for the defendant. A new trial was granted; and Abbott, C.J., delivering the judgment of the Court, says (1): "The general rule of the law of England is, that a man who has no authority to sell cannot by making a sale transfer the property to another. There is one exception to that rule, viz. the case of sales in market overt. Now, this being the rule of law, I ought either to have told the jury, that, even if there was an unsuspicious purchase by the defendant, yet, as Smith had no authority to sell, they should find their verdict for the plaintiffs, or I should have left it to the jury to say whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having, not the possession only, but the property; for, if the real owner of goods suffer another to have possession of his property and of those documents which are the indicia of property, then *perhaps* a sale by such a person would bind the true owner. That would be the most favourable way of putting the case for the defendant: and that question, *if it arises upon the evidence*, ought to have been submitted to the jury." The legislature seem to have intended to declare the law in future on the two points on which in that judgment doubt was expressed, and which I have indicated by putting them in italics.

When we look at the language used in the two earlier Factors Acts with reference to this state of the law, it seems to us clear that the legislature intended by 4 Geo. 4, c. 83, to alter the law in favour of consignees, so far as to enact that, where goods were shipped in the names of persons "intrusted for the purposes of sale" with goods, the consignees might advance money on the security of the goods as if the consignors were the true owners, unless they had notice to the contrary; with a proviso (which may have some bearing on the construction of s. 4 of 5 & 6 Vict. c. 39) that the persons in whose names such goods are so shipped shall be taken to have been intrusted therewith, unless the contrary "appear or be shewn in evidence by any person disputing the

(1) 3 B. & C. at p. 42.

fact." And by the 2nd section of that Act, the legislature repealed *M'Combie* v. *Davies* (1) in so far as it was applicable to those taking pledges from consignees: but that Act did not alter the established law as to pledging, with regard to others than consignors and consignees. The 6 Geo. 4, c. 94, s. 1, re-enacted the 1st section of 4 Geo. 4, c. 83.

We are not in the present case concerned with the rights of consignees, except in so far as the provisions respecting them throw light on the other sections of the Acts. The 2nd section of 6 Geo. 4, c. 94, made an important alteration in the law, as by it the possession of bills of lading or other documents of title gave a power of selling or pledging the goods to those dealing bonâ fide with the possessor, beyond any which either by common law or by any provision of that statute the possession of the goods themselves gave. This solved one of the doubts expressed in *Dyer* v. *Pearson* (2), by enacting that the possession of the documents of title might enable the person so possessed to deal with others as if he were the owner of the goods. It was confined, however, to the possession by "persons intrusted with" these documents of title; on which words a construction was put by the Courts in the two cases of *Phillips* v. *Huth* (3) and *Hatfield* v. *Phillips*. (4)

The 5 & 6 Vict. c. 39, in consequence of these decisions, altered the law as to what should constitute intrusting. The 2nd section of 6 Geo. 4, c. 94, also contained a proviso that the purchaser or pledgee had not notice, by the documents or otherwise, that the seller or pledgor was not "the actual and bonâ fide" owner of the goods sold or pledged,—a proviso which, especially after the decision of *Fletcher* v. *Heath* (5), rendered it unsafe to make advances on goods or documents to persons known to have possession thereof as agents only. This also has been altered by 5 & 6 Vict. c. 39. But, in the 4th section of 6 Geo. 4, c. 94, the language used by the legislature is completely changed. It does not in this section give any power to pledge at all; nor does it use the language of the 2nd section, and authorize "any person

(1) 7 East, 5.
(2) 3 B. & C. 38.
(3) 6 M. & W. 572.
(4) 9 M. & W. 647; 12 Cl. & F. 343.
(5) 7 B. & C. 517.

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intrusted with the possession of the goods" to sell them to any one not having notice that this person is not the true owner: but it enacts that it shall be lawful to contract with "any agent" intrusted with any goods, or to whom they may be consigned, for the purchase of such goods, and to pay for the same to "such agent;" and such sale and payment is to be good, notwithstanding the purchaser has notice that the party selling or receiving payment is only an agent; provided such contract or payment is made in the usual course of business,—a proviso which by itself alone shews that the legislature meant by the word "agent" only such agents as in the usual course of business sell goods for their principals and receive payments, such as factors, brokers, &c., and did not mean to include bailees, warehousemen, carriers, and others who may in one sense no doubt be called agents, but who do not sell or receive payment for goods intrusted to them by those employing them. It therefore solves the second doubt in *Dyer* v. *Pearson* (1), by declaring that, if the evidence should be such as to shew that the person in possession of the goods was intrusted as "an agent," a sale by him should bind the true owner.

Then follows a further proviso, that the person dealing with the agent has not notice that the agent is not authorized to sell or receive payment. This latter proviso shews that the framer of the Act remembered that a factor might, as between him and his principal, be restrained from selling except on particular terms, or possibly forbidden to sell at all, and yet that the sale on the usual terms, though in contravention of those secret instructions, would be good as regards those who had not notice of this restriction, but bad as regards those who had.

It seems to us, therefore, that the legislature by this section intended to confirm (to use Lord Tenterden's expression) the common law as laid down in *Pickering* v. *Busk* (2), but did not mean to extend it to all cases in which any person is intrusted with the custody of goods, though that person may in one sense be an agent for the intruster. And it seems to us that, on the construction of the Act, and without reference to authority, it must be intended to apply only to cases in which the intrusting is in the

(1) 3 B. & C. 38. (2) 15 East, 38.

course of that kind of agency, so as to create the relation of principal and agent between the intruster and the intrusted. In effect, that the decision in *Wilkinson* v. *King* (1) was not overruled or shaken in *Pickering* v. *Busk* (2), and was not intended to be affected by the legislature. For example, if a furnished house be let to one who carries on the business of an auctioneer, he is intrusted as tenant with the furniture, being in fact an auctioneer: but it never was the common law, and could not be intended to be enacted, that, if he carried the furniture to his auction room and there sold it, he could confer any better title on the purchaser than if he had as auctioneer acted for some other tenant who committed a similar larceny, as a fraudulent bailee: nor, to come nearer to the present case, that a warehouseman or wharfinger who as such is intrusted with the custody of goods, if he happens also to pursue the trade of a factor, can give a better title by the sale of the goods than he could if they had been intrusted to some other warehouseman who employed him to sell.

This was the construction put upon the Act in *Monk* v. *Whittenbury* (3), decided in 1831; and that decision has never been questioned. That decision was before 5 & 6 Vict. c. 39: and the legislature might easily have altered the enactments, if they had been so minded, so as to avoid the effect of that decision, as they did alter them so as to avoid the effect of other decisions.

The 5 & 6 Vict. c. 39, commences with a preamble; and though, of course, the enacting part may either go further than or fall short of effecting what is recited in that preamble as being the object of the legislature, that preamble is of great importance. It first recites that, under 6 Geo. 4, c. 94, "and the present state of the law, advances cannot safely be made upon goods or documents of title to persons known to have possession as agents only." This points to *Fletcher* v. *Heath* (4), and shews an intention to alter the law as there decided. It then recites that "advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be

(1) 2 Camp. 335.
(2) 15 East, 38.
(3) 2 B. & Ad. 484.
(4) 7 B. & C. 517.

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extended to bonâ fide advances upon goods and merchandise as by the said recited Act is given to sales, and that owners intrusting agents with the possession of goods and merchandise, or of documents of title thereto, should in all cases where such owners by the said recited Act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances bonâ fide made on the security thereof."

This recital shews a plain intention to enact that what had, ever since the case of *Paterson* v. *Tash* (1), been the law, should no longer be so; and that an agent having power to sell should be also enabled to pledge. But there is no indication of any intention to give a power to pledge where there is not power to sell; nor to extend the power to sell beyond that which by the common law and 6 Geo. 4, c. 94, s. 4, was given; nor to alter the construction put upon that enactment by the decision in *Monk* v. *Whittenbury*. (2)

There is a further recital, that the Act does not extend to protect exchanges of securities bonâ fide made. This refers to *Taylor* v. *Kymer* (3) and perhaps *Bonzi* v. *Stewart* (4), though that latter case (after very protracted litigation) was not decided till a few weeks before 5 & 6 Vict. c. 39 received the Royal assent, and this recital shews an intention to alter the law as there decided.

There is no express recital pointing to the decision in *Phillips* v. *Huth* (5), and the case of *Hatfield* v. *Phillips* (6), which had then been decided in the Exchequer Chamber and was still pending in the House of Lords; but, from the enactment in the 4th section, it is plain that these cases were in contemplation, and that it was intended to alter the law as laid down in those cases.

The legislature then proceed in the first section to enact that "any agent" who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, may pledge the same. The legislature, it is to be observed, does not use the words "person intrusted," which are those used in the 2nd section of 6 Geo. 4, c. 94, but "agent intrusted," being the words used in

(1) 2 Str. 1178.
(2) 2 B. & Ad. 484.
(3) 3 B. & Ad. 320.
(4) 4 M. & G. 295.
(5) 6 M. & W. 572.
(6) 9 M. & W. 647; 12 Cl. & F. 343.

the 4th section of the Act, on which words a judicial construction had been put in *Monk* v. *Whittenbury*. (1)

The 2nd section alters the law as declared in *Taylor* v. *Kymer*. (2) The 4th section alters the law as laid down in *Phillips* v. *Huth* (3), by enacting "that any agent intrusted as aforesaid and in possession of any such documents of title, whether derived immediately from the owner of such goods or obtained by reason of such agent's having been intrusted with the possession of the goods or of any other document of title, shall be deemed and taken to be intrusted with the possession of the goods:" . . . "and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this Act, to have been intrusted therewith by the owner thereof, unless the contrary can be shewn in evidence." It is not necessary to notice any other parts of the Act.

Mr. Benjamin argued that the object of the legislature was, to afford facilities for safely making advances; and that this object was only imperfectly carried out if an advance made under such circumstances as the present was not protected. He argued that the defendants had no means of knowing whether Slee was possessed as a warehouseman or as a broker. As far as regards the mohair, this argument fails in fact; for, a very little inquiry would have made the defendants aware that Slee was not a broker for mohair at all. As regards the sheep's wool, however, there is force in the argument that the defendants might, without much negligence, be led by Slee to believe that he was intrusted with the sheep's wool as a broker. But, if the plaintiffs knew that the warehouseman whom they trusted was also a wool-broker, the defendants were aware that the wool-broker whom they trusted was also a warehouseman; and there seems no reason why without inquiry they should think he was intrusted in one capacity rather than the other.

Probably 5 & 6 Vict. c. 39, s. 4, requires us to treat him as being so intrusted, unless the contrary is shewn in evidence. But we are all of opinion that in this case the plaintiffs have shewn in evidence that Slee was not intrusted as broker, but

(1) 2 B. & Ad. 484. (2) 3 B. & Ad. 320.
(3) 6 M. & W. 572.

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solely as warehouseman. We do not think that the legislature wished to give to all sales and pledges in the ordinary course of business the effect which the common law gives to sales in market overt. If such had been their object, it could easily have been so enacted in terms; which certainly has not been done.

The general rule of law is, that, where a person is deceived by another into believing he may safely deal with property, he bears the loss, unless he can shew that he was misled by the act of the true owner. The legislature seem to us to have wished to make it the law, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled any one who bonâ fide deals with the agent and makes a purchase from or an advance to him without notice that he was not authorized to sell or to procure the advance. And we think that, if this was the intention, it is carried out by the enactments. We do not think that it was wished to make the owner of goods lose his property if he trusted the possession to a person who in some other capacity made sales, in case that person sold them. If such was the wish of those who framed the Act, we think they have not used language sufficient to express an intention so to enact.

Hitherto we have been considering the statute 5 & 6 Vict. c. 39 as if we had to construe its language for the first time, without the assistance of any decided cases. We think, however, that every case that has been decided since the passing of the statute confirms our view. In *Wood* v. *Rowcliffe* (1), Wigram, V.C., held that a person intrusted to keep in her own house furniture belonging to the plaintiff, though in one sense an agent for the owner, was not an agent within the meaning of the Act, and consequently could not make a good pledge. In *Lamb* v. *Attenborough* (2), it was held that a clerk, who as such was possessed of delivery orders, was not an agent intrusted within the meaning of the Act, and could not make a good pledge. In *Heyman* v. *Flewker* (3), Willes, J., in delivering judgment, says that what the cases decide

(1) 6 Hare, 183.

(2) 1 B. & S. 831; 31 L. J. (Q.B.) 41.

(3) 13 C. B. (N.S.) 519; 32 L. J. (C.P.) 132.

"may be stated thus,—that the term 'agent' does not include a mere servant or care-taker, or one who has possession of goods for carriage, safe custody, or otherwise as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the Act has taken its name." So, it has been repeatedly decided that a sale or pledge of a delivery order or other document of title (not being a bill of lading) by the vendee does not defeat the unpaid vendor's rights, because the vendee is not intrusted as an agent: *Jenkyns* v. *Usborne* (1); *M'Ewan* v. *Smith.* (2) And it may be observed that, in many of such cases, in which money has been advanced to the buyer on the faith of the document of title, the buyer must have been a person who carried on business as a commission-merchant: yet it never seems to have occurred to any one that that fact made any difference. So, it has been repeatedly held that, where either the goods or documents of title are obtained from the owner (not on a contract of sale good till defeated, though defeasible on account of fraud, but by some trick), a purchaser or pledgee acquires no title, for, the trickster is not "an agent intrusted" with the possession: *Kingsford* v. *Merry* (3); *Hardman* v. *Booth.* (4)

Quite consistently with these latter decisions it was held, first by the Exchequer, on demurrer, in *Sheppard* v. *Union Bank of London* (5), and afterwards by the Court of Queen's Bench, on the facts, in *Baines* v. *Swainson* (6), that, if the true owner did in fact intrust the agent as an agent, though he was induced to do so by fraud, a pledge by the agent would be good.

In *Fuentes* v. *Montis* (7) it was decided, first by the Common Pleas, and afterwards by the Exchequer Chamber, that, after the true owner had demanded back his goods from the factor, who wrongfully refused to give them up, the factor ceased to be "intrusted," and a pledge subsequently made by him was not good. In delivering judgment, Willes, J., speaks of *Baines* v. *Swain-*

(1) 7 M. & G. 678.
(2) 2 H. L. C. 309.
(3) 1 H. & N. 503; 26 L. J. (Ex) 83.
(4) 1 H. & C. 803; 32 L. J. (Ex.) 105.
(5) 7 H. & N. 661; 31 L. J. (Ex.) 154.
(6) 4 B. & S. 270; 32 L. J. (Q.B.) 281.
(7) Law Rep. 3 C. P. 268; Law Rep. 4 C. P. 93.

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son (1) as going to the extreme of the law, but does not express dissent from it.

Against this great mass of authority, Mr. Benjamin could produce nothing but some observations of Lord Westbury in *Vickers* v. *Hertz* (2); but we think, when those are rightly understood, they are not in conflict with the other decisions. The facts in *Vickers* v. *Hertz* (2) bear a very close resemblance to those in *Baines* v. *Swainson.* (1) Campbell, who was a Glasgow broker, had represented to Vickers that he had made for him a sale to a principal of a large quantity of iron. This, it seems, was a falsehood. Vickers was induced by the falsehood to send a delivery-order to Campbell. He did not intrust him with the delivery-order with a view to his making a sale, for he thought it was already made; but he did intrust him in the course of his business as agent with the document of title, that he might as such agent deliver the goods. The decision of the House of Lords was, that a pledge by Campbell was good under the Factors Acts. Lord Westbury seems to have understood Willes, J., in *Fuentes* v. *Montis* (3), as expressing an opinion that the Act did not embrace the case of any but a factor who was intrusted for the purpose of effecting a sale not yet made. Had Willes, J., expressed such an opinion, it would, no doubt, have been inconsistent with *Baines* v. *Swainson* (1), and been overruled by the House of Lords in *Vickers* v. *Hertz.* (2) We think, however, that he expressed no such opinion, and, consequently, that all the authorities are in unison with the decision of the Common Pleas in this case, which we therefore affirm.

BRAMWELL, B. I find as a fact in this case that Slee was in possession of this wool only as a warehouseman. He certainly was in possession of the goats' wool in that and in no other character. He got and kept possession of the sheep's wool just in the same way as he did of the goats'; and, though he usually sold the sheep's wool, it was under specific instructions; he had no general authority to do so; he acted under specific instructions. I infer that, as he did it *usually,* he did not do it always, and that there

(1) 4 B. & S. 270; 32 L. J. (Q.B.) 281.

(2) Law Rep. 2 H. L., Sc. 113.

(3) Law Rep. 3 C. P. at p. 284.

was nothing in the dealings between the parties to prevent the plaintiffs from having the sheep's wool sent to London, or employing somebody else to sell it. Moreover, his possession of the sheep's wool was not necessary to his selling it as a broker, nor, I suppose, a thing ordinarily the case with sheep's wool brokers; nothing of the sort is stated. His possession of both classes of wool was accounted for in the same way, unconnected with his being a broker, viz. by Liverpool being the port of landing, his having warehouses there, and being employed to land the wool and warehouse it in his own warehouses. I may add, though it is not material, that it does not appear that the defendants knew he had the wool nor the documents of title for it. Indeed, as to the *Grecian's* parcel, they could not know it.

These being the facts, as I view and find them, was he an agent intrusted with the possession of goods within the meaning of 5 & 6 Vict. c. 39, s. 1? The argument is that he is an agent, and that he is intrusted with the possession of the goods. But, unless we adopt a verbal construction that leads to absurdities, some limitations must be put on these words; some such limitation as "agent intrusted as such, and ordinarily having as such agent a power of sale or pledge;" otherwise, the words would include the case of an agent for the sale of one thing, say, a metal-broker intrusted with a thing unconnected with his agency, say, wool; and also the case of an agent for some purpose which neither in fact gave him power to sell or pledge, nor according to the usage of business appeared to give such power. For instance, a packer intrusted with goods, though known to be a packer by the lender of money, might pledge the goods to such lender. So a carrier, who is an agent to deliver goods from A. to B., would have power to pledge to C., who knew he was a carrier only, and as such only had possession. Because the conclusion of s. 1 protects the transaction, though the pledgee "may have had notice that the person is only an agent." But, only an agent in what sense? Surely only an agent such as the pledgee might well suppose had power to pledge. This clause and this part of it being intended to protect persons who deal with agents known to be such, who in reason may pledge because they usually make advances to those who have intrusted them with the goods. It may be said that these difficulties are met by the pro-

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vision that the transaction must be bonâ fide in the man advancing the money. But the answer is not sufficient. He might bonâ fide believe in a special authority or right to pledge, where there was none at all.

It seems to me, speaking generally, that the statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed. That is not the case here. In the first place, as I have observed, the possession of the wool was not necessary to Slee's acting as broker in relation to it. But, in the next place, Slee filled two characters. If the defendants chose to trust him as the possessor of goods, without inquiring in which character he possessed them, they cannot get a title on the ground that he was in possession in fact, when he was not in possession as agent nor intrusted as such.

When I look at the terms of Slee's note to the defendants, I doubt if the defendants trusted him on account of his possession of the wool, or knew of it. The *decisions* are, in my judgment, uniform in favour of this view.

The cases are so fully considered by my Brother Blackburn, that I think it needless to go into them. I am of opinion judgment should be affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Clarke, Son, & Rawlins.*

Attorneys for defendants: *Chester, Urquhart, Bushby, & Mayhew, for Laces, Banner, & Co., Liverpool.*

END OF HILARY TERM, 1875.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

EASTER TERM, XXXVIII VICTORIA.

SANDILL *v.* FRANKLIN.

1875
April 15.

Landlord and Tenant—Tenancy from Year to Year—Notice to Quit—Commencement of Tenancy.

A written agreement for the letting of certain premises expressed the tenancy to be "for a year certain, and so on from year to year until a half-year's notice should be given by or to either party, at a yearly rent of 50*l.* payable quarterly, the first payment to be on the 25th of March next." The agreement was dated the 20th of December, 1872, and specified no date for the commencement of the term:—

Held, that a notice to quit given by the landlord on the 24th of June, 1874, was a good notice.

EJECTMENT by landlord against tenant.

The trial took place before Denman, J., at the sittings in Middlesex after Hilary Term, when the facts were as follows:—

The tenancy was under a written agreement dated the 20th of December, 1872, and no date was specified for the commencement of the term, but it was expressed to be for a year certain, and so on from year to year, until a half-year's notice to quit should be given by or to either party, at a yearly rent of 50*l.* to be paid

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quarterly, the first payment to be on the 25th of March next. The landlord had given notice to quit on the 24th of June, 1874. On these facts a verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter a verdict for the defendant on the ground that the notice was bad.

Gibbons moved in pursuance of the leave. No date being fixed for the commencement of the term, the legal presumption is that it was to commence from the date of the agreement, viz. the 20th of December; if so, the notice ought to have been given on the 20th of June: *Doe* v. *Matthews.* (1)

LORD COLERIDGE, C.J. I think there should be no rule. But for the provision as to the date of the payment of the first quarter's rent, I think Mr. Gibbons' contention might have been sound. I think that provision is a clear indication that the parties meant that the tenancy should be considered as commencing from the usual quarter-day, i.e. the 25th of December.

BRETT, J., concurred.

ARCHIBALD, J. I am of the same opinion. In the absence of anything to lead to a contrary conclusion the date of the agreement might be presumed to be the commencement of the tenancy, but I think, looking to the fact that the first quarter was to end on the 25th of March, the parties intended the tenancy to be from the regular quarter-day.

HUDDLESTON, J., concurred.

Rule refused.

Attorney for defendant: *S. T. Cooper.*

(1) 11 C. B. 675.

WORTHINGTON *v.* JEFFRIES.

1875
April 21.

Prohibition—Mayor's Court—Right to a Declaration in Prohibition—Discretion.

Where a superior Court is clearly of opinion, both with reference to the facts and the law, that an inferior Court is exceeding its jurisdiction, it is bound to grant a writ of prohibition; whether the applicant for the prohibition is the defendant below or a stranger. In such a case, neither the smallness of the claim in the suit below nor delay on the part of the applicant is a reason for refusing the writ. The plaintiff in the inferior court has in no case an absolute right to have the plaintiff in prohibition put to declare in prohibition.

THIS was an application for a writ of prohibition to the Mayor's Court. A rule nisi having been obtained,

Grantham shewed cause.

Wightman Wood supported the rule.

The facts, arguments, and authorities cited fully appear from the judgment.

Cur. adv. vult.

April 21. The judgment of the Court (Brett, Grove, and Denman, JJ. (1)), was delivered by

BRETT, J. In this case, Mr. Wood, moving on the instructions of the defendant's attorney, as a stranger to the suit, obtained a rule calling on the plaintiff to shew cause why a writ of prohibition should not issue to the Mayor's Court of the city of London. It appeared from the affidavits in support of the motion, which were not contradicted when cause was shewn, that the action was brought to recover 11*l.*, the price of beer sold and delivered; that the plaintiff was a brewer at Burton-on-Trent; that the order was given in the city of London, but that the beer sent from Burton was delivered at the defendant's place of business in Covent Garden. Mr. Grantham shewed cause. He did not deny that, according to previous decisions of this Court, the writ might issue; but he submitted that the Court had a discretion to refuse the writ on the ground that the amount sought to be recovered was too small to justify interference; and that he,

(1) Keating, J. had retired at the end of Hilary Term, but concurred in the judgment.

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desiring to question the former decisions of this Court, had a right, if the Court inclined to the prohibition, to an order from the Court that the plaintiff in prohibition should declare in prohibition. In consequence of the great number of applications to this Court for prohibition to the Mayor's Court in small suits, both points seemed to us to require consideration. It is agreed by all, that upon an application to any of the superior Courts for a prohibition the Court has a discretion in some cases to refuse to prohibit. Whether the application be by the defendant in the suit below, or the plaintiff, or a stranger, if the Court doubt as to what is the true state of facts, or as to the law applicable to recognised facts, it is indisputable that the Court may decline to proceed further, may refuse to prohibit or direct the plaintiff in prohibition to declare. It is also agreed that, if the defendant in an inferior Court makes it clear to a superior Court both in fact and law that the inferior Court is proceeding without or beyond jurisdiction, the superior Court is judicially bound ex debito justitiæ to issue a writ of prohibition. In such a case, when the defendant below is the applicant for prohibition, it is admitted that the superior Court has no discretion to refuse to prohibit on the ground that the amount in dispute is small, or that the application is made late, or on any similar ground. The first point, therefore, now urged is, as Mr. Grantham when pressed admitted, that, although the Court is clear both as to the facts and the law that the inferior Court is acting without jurisdiction, that the cause below therefore is coram non judice, so that if the defendant below were the informant of the superior Court it would be bound to issue the writ of prohibition, yet, if a stranger be the informant, the Court may refuse the prohibition on the ground that the matter in dispute is small, or that the application is, in the opinion of the Court, too late, or on some similar ground. The second point, in like manner, is that, although the Court is clear both with regard to the facts and the law that the inferior Court is acting without jurisdiction, and although the proposed decision of the Court has upon precisely similar facts been approved of in the House of Lords in a former prohibition suit, yet, if the Court be about to prohibit, the defendant in prohibition has a right to an order of the Court to the plaintiff in prohibition calling upon him

to declare in prohibition. And for this the high authority of Lord Mansfield is cited.

In order to determine both points, it seems to us advisable to draw attention again to the origin and reason of the writ of prohibition, and to the history of the procedures by which it has at different times been enforced: "As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a great variety of Courts, hence it hath been the care of the Crown that these Courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed, which issues out of the superior courts of common law to restrain inferior courts" (Bacon's Abridgment, Prohibition, quoting Rolle's Abridgment). "The object of prohibition in general is the preservation of the right of the King's Crown and Courts, and the ease and quiet of the subject" (Ibid.). "The King may sue for a prohibition, though the plea in the spiritual court be between two common persons, because the writ is in derogation of his crown and dignity" (Ibid. C.). "It is contra coronam et dignitatem regiam for any to usurp to deal in that which they have not lawful warrant from the Crown to deal in, or to take from the temporal jurisdiction that which belonged to it. The prohibitions do not import that the ecclesiastical courts are aliud than the King's or not the King's courts, but do import that the cause is drawn into aliud examen than it ought to be, and therefore it is always said in the prohibitions (be the court temporal or ecclesiastical, to which it is awarded), if they deal in any case of which they have not power to hold plea, that the cause is drawn ad aliud examen than it ought to be, and therefore contra coronam et dignitatem regiam" (2nd answer in Articuli cleri, 2nd Inst. 602). "None may pursue in the ecclesiastical court for that which the King's court ought to hold plea of, but upon information thereof given to the King's court, either by the plaintiff or by any mere stranger, they are to be prohibited, because they deal in that which appertaineth not to their jurisdiction" (Ibid. 10th answer).

And in the judgment of Willes, J., in *Cox* v. *Mayor of London* (1),

(1) Law Rep. 2 H. L. 239, at p. 254.

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which seemed to exhaust all learning and ingenuity upon the questions of prohibition, this point is thus treated: "All lawful jurisdiction is derived from and must be traced to the royal authority. Any exercise, however fitting it may appear, of jurisdiction not so authorized is an usurpation of the prerogative and a resort to force unwarranted by law. Upon both grounds, viz., the infringement of the prerogative and the unauthorized proceeding against the individual, "prohibitions by law are to be granted at any time to restrain a Court to intermeddle with or execute anything which by law they ought not to hold plea of. And they are much mistaken that maintain the contrary." These authorities shew that the ground of decision, in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed. If this were not so, it seems difficult to understand why a stranger may interfere at all. If this be so, on what principle can there be any distinction in the action of the superior Court dependent upon the means by which, or the persons by whom it is informed of the breach of order, which is a breach of the prerogative? If it is the absolute duty of the superior Court to enforce order on being convinced of a breach of it by information given by the defendant in the suit below, why should it be a less absolute duty if it is convinced of the same breach of order by information given by a stranger? Order is no less broken, the prerogative is no less invaded! And if the smallness of the matter in dispute is to be a ground for non-interference, still more if delay in application for the writ of prohibition is to be a ground, they would seem to be stronger grounds if the defendant is to be treated as the party whose interest is to be protected, than if the interference is to be based only on the necessity of preserving administrative regularity or order. Assume that the defendant in the suit is in the wrong, there may be no damage in fact to him by the declaration of his liability being made by one Court rather than by another. It is true that there may be, as by his being cited to a distance, or into a court of more expensive procedure. But these difficulties may exist, although the Court has jurisdiction. It follows from this view, also, that

the real ground of the interference by prohibition is not that the defendant below is individually damaged, but that the cause is drawn in aliud examen, that public order in administration of law is broken. And inasmuch as the duty of enforcing such order is imposed on the superior Courts, and the issue of a writ of prohibition is the means given to them by law of enforcing such order, it seems to us that, upon principle and in the absence of enactment, it must be their duty to issue such writ whenever they are clearly convinced by legal evidence, by whomsoever brought before them, that an inferior Court is acting without jurisdiction, or is exceeding its jurisdiction. And thus in the third answer in the case of the "Articuli cleri," the duty is declared in absolute terms applicable to all cases: "Prohibitions by law *are to be* granted at any time to restrain a Court to intermeddle with or execute anything which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary." And in *Wadsworth* v. *Queen of Spain* (1): "Therefore this Court, vested with the power of preventing all inferior Courts from exceeding their jurisdiction to the prejudice of the Queen or her subjects, *is bound to* interfere when duly informed of such an excess of jurisdiction." And again, "The garnishee at all events is a 'stranger' on whose information and complaint of the excess of jurisdiction in contempt of the Crown, we *shall be bound to* correct it by prohibition" (p. 217).

It is true that there is in *Forster* v. *Berridge* (2) a most weighty and formidable dictum in favour of the alleged distinction between information brought forward by a stranger and by the defendant in the suit below. But, after anxious consideration, we are led to doubt whether the exact point, as now laid before us, was presented to the minds of the judges in that case. We doubt whether the point was presented to the minds of the judges, that they could refuse to prohibit, if both on the facts and the law they were clear that an inferior Court was acting without jurisdiction. In that case it is obvious that there was that uncertainty as to the law which has always been held to be a justification to a Court to refuse to prohibit or to direct a declaration in prohibition. On the first point, therefore, we are of opinion that, whether

(1) ~~Law Rep.~~ 17 Q. B. 171; 20 L. J. (Q.B.) 488.

(2) 4 B. & S. 187; 32 L. J. (Q.B.) 312. 10 Jur. N.S. 254

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the superior Court be informed by the defendant or the plaintiff in the suit in the court below, or by a stranger, the only discretion which the superior Court has to refuse a prohibition is, if it doubt in fact or law whether the inferior Court is exceeding its jurisdiction, or is acting without jurisdiction; but if the superior Court is clear in fact and in law that the inferior Court is acting in excess of its jurisdiction, or without jurisdiction, it cannot rightly refuse to enforce public order in the administration of the law by refusing either to issue a writ of prohibition or to put the plaintiff in prohibition to declare in prohibition.

As to the second point, it is probable that in the beginning a writ of prohibition issued on mere verbal information given to a superior Court of Common law that an inferior temporal Court or the ecclesiastical Court was exceeding its jurisdiction. However that may be, it seems clear that it was granted on a surmise or suggestion made without oath. By stat. 2 & 3 Ed. 6, c. 13. s. 14: "If any party, for any matter or cause do sue for a prohibition," &c., he shall, before it be granted," &c., "bring the very true copy of the libel, and under it shall be written the suggestion; and in case the said suggestion be not proved true within six months next following after the said prohibition shall be granted and awarded, &c." Here the proof of the truth of the suggestion comes after the issue of the writ granted upon the suggestion. So in the 8th complaint in Articuli cleri: "Furthermore the prohibition is quick and speedy, for it is ordinarily granted out of court by any one of the judges in his chambers, whereas the consultation is very slowly and hardly obtained, not without oftentimes costly motions in open court, pleadings, demurrers, and sundry judicial hearings of both parties, &c." And the 28th answer: "Neither may the prohibition be denied upon the surmise made that the matter pursued in the ecclesiastical court is of temporal cognizance, but as soon as that shall appear unto us judicially to be false, we grant the consultation." These seem to shew a practice to issue the writ upon a suggestion or surmise sufficient on the face of it, as a writ of mandamus is now issued, with power afterwards to set it aside on sufficient cause shewn. This latter might be done by satisfying the Court at once on affidavit, or by inducing the Court to put the plaintiff in prohibition to declare in prohibi-

tion. This practice is obviously inconsistent with a suggested right on the part of the defendant in prohibition to an order that the plaintiff in prohibition should declare in prohibition before the issue of the writ of prohibition. There is no trace of such a right in any book, and yet, if it had existed, it is impossible to suppose that a wealthy hierarchy, fighting desperately for privileges, would not have exercised it; for by continually forcing every plaintiff in prohibition into a contested lawsuit a wealthy Court would inevitably in the end establish its jurisdiction. The absence of any instance of the exercise of the suggested right is the strongest evidence against its existence. It seems, next, not difficult to understand how the practice may have altered, and how, instead of issuing the writ at once, and then inquiring whether it should stand, the Court, in case of doubt, should require the plaintiff in prohibition to declare in prohibition, and so the Court should ascertain beyond doubt the facts or the law before issuing the writ. The Courts would thus, in legal phraseology, inform their conscience before, instead of after, resolving to prohibit. This proceeding, it is said, is in the nature of an issue to inform the conscience of the Court (Bacon's Abridgment, Prohibition, F. 579). That this came to be the procedure is evidenced by stat. 1 Wm. 4, c. 21, s. 1, which, reciting that the filing a suggestion on application for a writ of prohibition is productive of unnecessary expense, and the allegation of contempt in a declaration of prohibition filed before writ issued is an unnecessary form, &c., enacts "that it shall not be necessary to file a suggestion on any application for a writ of prohibition, but such application may be made on affidavits only; and in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not as heretofore on behalf of the party and His Majesty, and without alleging the delivery of a writ or any contempt," &c. The new practice, then, being inaugurated and adopted, the question is, whether the suggested right has been introduced with it. The declaration in prohibition is for the purpose of informing the conscience of the Court, that is to say, of making the Court clear upon consideration as to facts, or law, or both. But if the Court is already clear, why should it inquire further? Assume the

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question to be one of law, and the Court to be clear as to the law, the very point by admission having been previously decided by the House of Lords, can it be that the Court is bound on request to order the same question to be raised on demurrer, and to hear the question again and again solemnly argued, when it must be bound by authority to decide it always in one way? And yet this is the state of things suggested to be according to law. But then we have to deal with the formidable statement of Lord Mansfield in the case of *St. John's College* v. *Teddington* (1): "When the Court is clearly of opinion that there is sufficient ground for a prohibition, the defendant has a right to put the plaintiff to declare, that his jurisdiction may not be taken from him in a summary way where no writ of error will lie." It is curious, however, to find that in the Index to 1 Burr., in which is a statement equivalent to that which in more modern reports is called the head-note of the case, the phrase used by him who reported the judgment is that the defendant in prohibition has "perhaps" a right to demand it, i.e. a declaration by the plaintiff in prohibition when the opinion of the Court is against him. And in the report in 1 W. Bl. 81, of the same case, the phrase attributed to Lord Mansfield in the judgment is "a sort of right." The same phrase of a "sort of right" is adopted in Buller's Nisi Prius, and so in *Remington* v. *Dalby* (2), where it was insisted that the party opposing the rule was entitled to insist upon the opposite party declaring in prohibition, in order that the question might be placed on the record, Lord Denman is stated to have acceded in terms. But in the report of the case in 14 L. J. (Q. B.) 6, he is made to use the phrase "a sort of right." And in both cases, and in the cases which were then arising before the Courts where the jurisdiction claimed, being that of a proprietory Court, was a valuable property, and where each jurisdiction claimed was by virtue of a different grant, it seemed appropriate to say that the person whose jurisdiction was attacked had almost a right, or a sort of right, to have the matter discussed in the most solemn form, and subject to appeal. But if the phraseology used was that "the party had a sort of right," it is obvious that the cases are no authority for the absolute right now claimed. And there seem

(1) 1 Burr. 198. (2) 9 Q. B. 476.

to be strong authorities to the contrary. In *Re Chancellor of Oxford* v. *Taylor* (1), it is stated at the end of the report, note (*a*), p. 974: "After the judgment was given, Lord Denman, C.J., in answer to a question put by the counsel for the University, said that the writ was to issue, and that the Court, entertaining no doubt, did not mean to put the complainant to declare in prohibition." And *In re Dean of York* (2), the counsel, arguing for the defendant in prohibition, submitted that should the Court incline to prohibit, they would order the party applying to declare, &c.; and the counsel for the plaintiff in prohibition retorted that it was discretionary in the Court to order parties to declare or not, but the course was not to do so when the case was clear. The judgment is: "If we felt any doubt we should be bound to invite further discussion by calling upon the Dean of York to declare in prohibition; but after the full and deliberate, long-prepared, and maturely digested arguments which we have heard enforced with consummate ability by counsel of the greatest learning and of the highest reputation, no additional light can be expected. We owe it to all the parties to save them the inconvenience and anxiety of further delay." And the rule for a prohibition was made absolute. And in *De Haber* v. *Queen of Portugal* (3), Lord Campbell, at p. 220, says: "If we had entertained any grave doubt upon the subject we should have directed the applicant to declare in prohibition, but being clearly of opinion that there is an excess of jurisdiction in the Court below, it is our duty simply to make the rule absolute." It is true that in these cases the application was made by the defendant in the suit below, but we think it impossible that such phraseology, without any notice of any distinction, would have been so often used if the suggested right had existed. Reason and authority seem to us, therefore, to be equally against the suggested claim of right. The authorities relied on in support of the claim, when examined, fail to support it. We are, therefore, of opinion that, although the Court inclines to a prohibition, the defendant in prohibition has no right to an order from the Court that the plaintiff in prohibition should declare in prohibition. We are of opinion that it is always in the discretion of

(1) 1 Q. B. 952. (2) 2 Q. B. 1.
(3) 17 Q. B. 220; 20 L. J. (Q.B.) 488.

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the Court to say whether the plaintiff in prohibition shall or shall not be put to declare; and that when the Court is clear both in fact and law that the inferior Court is acting in excess of or without jurisdiction, the writ of prohibition should issue without the plaintiff in prohibition being put to declare. In the present case the Court is of opinion that both facts and law are clear, and, therefore, that the writ of prohibition should issue, and that the rule should be made absolute with costs.

Rule absolute.

Attorney for plaintiff in prohibition: *Doyle.*
Attorney for defendant: *The City Solicitor.*

April 21.

DINN *v.* BLAKE.

Arbitration—Mistake of Law—Application to send back Award—Compulsory Reference.

An award will not be sent back to the arbitrator on the ground that he has made a mistake in the legal principle upon which his award is based, except where the arbitrator himself admits the mistake.

THIS was an action which had been compulsorily referred to the master under the Common Law Procedure Act, and application was now made on behalf of the plaintiff that the certificate of the master might be referred back to him in order that he might review his decision. The facts, so far as material, were as follows: The master had awarded against the plaintiff. It was stated in the affidavits, that after the master had pronounced his award he had stated in a conversation with the plaintiff the grounds on which he had decided. The plaintiff sought to shew that the grounds so stated shewed that the master had made a mistake in point of law.

Lucius Kelly moved for a rule nisi. He contended that where it was clearly shewn that the arbitrator had made a mistake in point of law or of fact the Court would send the award back. He cited *Flynn* v. *Robertson* (1); *In re Dare Valley Ry. Co.* (2); *Mills*

(1) Law Rep. 4 C. P. 324. (2) Law Rep. 6 Eq. 429.

v. *The Bowyers' Company* (1); *Re Hall and Hinds* (2); *Hodgkinson* v. *Fernie* (3); *Gore* v. *Baker* (4); *Lockwood* v. *Smith.* (5)

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BRETT, J. The motion is to refer back the certificate to the master that he may reconsider his award under the following circumstances: It is alleged that he has stated to the plaintiff orally the ground of his decision, and the plaintiff's counsel says that upon such statement he can satisfy the Court that the master decided wrongly in point of law. It is not in any way shewn to the Court that the master considers his decision to have been wrong. I am of opinion that in such a state of facts we have no jurisdiction to send back the certificate. This is a reference under the Common Law Procedure Act. Before that Act there was some fluctuation of opinion among the judges as to the question in what cases an award might be referred back; and after the Act it was asserted that the powers of the Court were in that respect larger than they were before. In the case of *Hodgkinson* v. *Fernie* (3) both questions, viz., as to when there was power to refer back and as to the effect of the statute, were considered, and the law was clearly declared in the judgment of Williams, J. He lays it down that the award cannot be sent back and the arbitrator forced to review it merely on the ground that there has been a mistake of fact or of law. The exceptions he mentions to the rule are where there has been corruption or fraud, and where it appears on the face of the award that there has been a mistake of law or fact. The plaintiff's counsel has cited certain cases to us as authorities in his favour. The first case was *In re Dare Valley Ry. Co.* (6); but in that case, as pointed out by my Brother Archibald, the arbitrator had taken into consideration what was never submitted to him, and so exceeded his jurisdiction. The other cases on which reliance was placed were *Mills* v. *The Bowyers' Company* (1), and *Flynn* v. *Robertson.* (7) The latter case was decided on the authority of *Mills* v. *The Bowyers' Company* (1), in which case it was said that the Court could refer back the

(1) 3 K. & J. 66.
(2) 2 Man. & G. 847.
(3) 3 C. B. (N.S.) 189; 26 L. J. (C.P.) 217.
(4) 4 E. & B. 470; 24 L. J. (Q.B.) 94.
(5) 10 W. R. 628.
(6) Law Rep. 6 Eq. 429.
(7) Law Rep, 4 C. P. 324.

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award if the arbitrator himself stated that in his opinion he had made a mistake of law or fact, and was desirous of the assistance of the Court and willing to review his decision on the point on which he believed himself to have gone wrong. These cases have apparently established another exception in addition to those mentioned by Williams, J. But the exception depends on the admission of the arbitrator himself. In *Lockwood* v. *Smith* (1) Martin, B., says: "There must be some grounds given us to suppose that the arbitrator is satisfied there has been a mistake." It appears to me that the present case is not brought within that exception. There will, therefore, be no rule.

DENMAN, J. I am of the same opinion. I only wish to say a few words as to the decision in *Gore* v. *Baker*. (2) In that case I was arbitrator, and there being pleas of never indebted and set-off, I was of opinion that the set-off exceeded the amount of the claim proved. I therefore found for the defendant on the plea of set-off; but a certain amount being shewn to be due subject to the set-off, I found generally for the plaintiff on the plea of never indebted. The effect of this, it appeared, would have been to give the whole costs of the issue to the plaintiff, though he failed in establishing a large part of his claim. The Common Law Procedure Act had been recently passed, under which it is provided that in such a case the jury shall find the issues distributively. Under these circumstances I gave the defendant a letter, stating that I was quite willing to do that if the Court thought proper. The Court had that letter before them, though it is not referred to in the report, and accordingly sent the award back to me to find distributively on the issue of never indebted. That case seems to me to constitute an example of that exception from the general rule which my Brother Brett referred to as an addition to those laid down by Williams, J. But the Court will not, in case of a mistake, send back the award without an assurance from the arbitrator himself that he is conscious of the mistake and desires the assistance of the Court to rectify it. In this case there is nothing of that sort. To accede to the application would be simply to allow of an appeal from the arbitrator on a point of law.

(1) 10 W. R. 628.

(2) 4 E. & B. 479; 24 L. J. (Q.B.) 94.

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ARCHIBALD, J. I am of the same opinion. The general principle is that an award is final; and, assuming that it is good on the face of it, there can be no appeal from it. The only exceptions are where there is corruption on the part of the arbitrator, or excess of jurisdiction, or where the arbitrator himself admits that there is a mistake, and, as it were, craves the assistance of the Court in setting it right. In this case the arbitrator has stated that he decided on certain grounds, and the plaintiff's counsel states that they are erroneous, but there is nothing to shew that the arbitrator admits that he has decided erroneously. The case does not, therefore, come within the exception to the general rule.

Rule refused.

Attorney for plaintiff: *Dinn.*

GRIMOLDBY *v.* WELLS.

April 23.

Sale—Goods not equal to Sample—Rejection by Purchaser—Purchaser not bound to send back the Goods.

Where goods were sold by sample, and the bulk was found by the purchaser on inspection after delivery not to be equal to sample:—

Held, that the purchaser might reject the goods by giving notice to the vendor that he would not accept them, and that they were at the vendor's risk, and was not bound to send back, or offer to send back, the goods to the vendor, or to place them in neutral custody.

APPEAL from the decision of the County Court of Lincolnshire.

The facts were as follows:—

The action was brought in March, 1874, to recover the price of four quarters of tares sold by the plaintiff to the defendant. The sale was by word of mouth by sample, and the bulk was delivered on the 9th of October, 1873, to the defendant. The defendant and plaintiff lived about nine miles apart, and the tares were sent part of the way in a cart belonging to the plaintiff, and then placed in a cart belonging to and sent by the defendant, and taken by his servant into his barn, where they remained at the time of the trial of the action. On the day of the delivery the defendant inspected the bulk, and then wrote and posted a letter to the plaintiff, which however was not produced at the trial, having been lost by

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the plaintiff. After the letter had been posted, but before the plaintiff received it, the defendant met the plaintiff and told him that the tares were in his (defendant's) barn, that they were bad, that he would not have them, nor pay for them, and that the plaintiff might do what he liked with them. The defendant stated that the contents of the letter were to the same general effect as the verbal statement. The defendant did not return, or offer to return, the tares to the plaintiff, nor did he place them in neutral custody, but they remained in his barn as before stated. Early in January the defendant, for the purpose of shewing that the tares were inferior to sample, had one of the sacks opened and "dressed over," and the result of the dressing was produced in court. The county court judge found that the tares were not equal to sample.

It was contended for the defendant that there was no sufficient evidence of an acceptance within the Statute of Frauds, and that the goods not being equal to sample the defendant was entitled to reject them.

The county court judge held that there was an acceptance within the Statute of Frauds, and, relying on the authority of *Couston* v. *Chapman* (1), that the defendant could not reject the goods without returning them, either actually or constructively, to the plaintiff, or, at any rate, placing them out of his own custody, and that having retained them in his own possession he was bound to pay for them. He therefore gave judgment for the plaintiff.

A. Wills, Q.C., for the defendant. The goods were rejected most unequivocally by the defendant. The only question is, whether in such a case there is any obligation to return, or offer to return the goods, or to place them in neutral custody. The county court judge appears to have relied on the decision in *Couston* v. *Chapman*. (1) The statement in the head-note, if it is to be construed as meaning that there is such an obligation, is not borne out by the judgment. The only passage which could be relied on as shewing there is such an obligation is that in Lord Chelmsford's judgment on p. 256, beginning "where a party desires to rescind, &c." But looking to the facts of the case it would

(1) Law Rep. 2 H. L., Sc. 250.

seem that "return" there only means "reject." On the other hand, in the case of *Lucy* v. *Mouflet* (1) Martin, B., and Bramwell, B., distinctly stated that there was no such obligation.

McKellar, for the plaintiff. The county court judge has found that there was an acceptance as a matter of fact. It is a strong thing to say that the vendor is bound to fetch the goods back any distance when, as here, the purchaser has removed them from the place of delivery.

[He cited *Cooke* v. *Riddelien* (2) and *Okell* v. *Smith*. (3)]

LORD COLERIDGE, C.J. I am of opinion that our judgment should be for the defendant. The first question is, whether there was an acceptance within the Statute of Frauds. It is not necessary in the view we take to decide this, but I should say that there was evidence of such an acceptance.

The next question is, whether the defendant has done anything to disentitle him to reject the goods. A person who seeks to reject goods as not in accordance with contract must do nothing after he discovers that they are so in the nature of an exercise of dominion over the goods, or inconsistent with the property in them being in the vendor. I do not see that in the present case the defendant did anything to make the goods his own. He merely left them in his barn, after distinctly giving notice to the plaintiff that he would not have them, and that he, the plaintiff, might do as he liked with them. Under these circumstances, it appears to have been pressed upon the judge that it was the duty of the purchaser if he rejected the goods, not only to abstain from exercising dominion over them, but to return them in the sense of actually sending them back to the vendor. It is admitted that there is no authority in favour of such a proposition, unless the expressions used by the House of Lords in the case of *Couston* v. *Chapman* (4) are such.

It appears to me manifest that no such effect can be attributed to them. The decision in that case was plainly in accordance with the settled law on the subject. What was there said was that some unequivocal act must be done by the purchaser, if he means to insist on his right of rejection, to shew that he does so reject; and in

(1) 5 H. & N. 229; 29 L. J. (Ex.) 110.
(2) 1 C. & K. 561.
(3) 1 Stark. 107.
(4) Law Rep. 2 H. L., Sc. 250.

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that case, the Court thought that there had been no such act. The proposition which it is attempted to base upon the dictum attributed to Lord Chelmsford, viz., that the purchaser must send the goods back, or place them in some neutral custody, forms no part of the judgment in the case. It seems to me that all that the noble lord meant was, that if either of the courses he referred to had been taken it would have constituted an unequivocal act signifying the intention to reject.

There is no want of authority to the contrary of the proposition contended for. In the case of *Lucy* v. *Mouflet* (1) both Martin, B. and Bramwell, B., expressly lay it down that it is not necessary to send back the goods in order to entitle the purchaser to reject them. It would be very hard if it were so. By the supposition the vendor has not complied with the contract, and has sent goods which as against the purchaser he had no right to send; why should he be entitled to impose upon the purchaser, who never bargained for such goods, and who has a right to reject them, the burden of sending them back, possibly for a considerable distance, at a considerable expense? No authority, as it seems to me, can be cited for such a proposition, and the reason and justice of the thing are against it. For these reasons it appears to me that the county court judge was wrong, and his judgment must be reversed.

BRETT, J. There are two points in this case. First, whether there was an acceptance of these goods within the Statute of Frauds. Secondly, whether it is necessary that the defendant should in fact send back or offer to send back the goods, or put them on neutral ground, in order to be entitled to exercise his right of rejecting them. As to the first point, I decline to give any opinion, because it is unnecessary, as I think, to decide it. Lord Campbell lays it down in *Morton* v. *Tibbett* (2) as the result of the authorities, that there may be an acceptance within the Statute of Frauds, but yet no such acceptance as to preclude the defendant from rejecting the goods if not in accordance with the contract. In the present case, therefore, I only assume that there was an acceptance which did make a binding contract within the Statute of Frauds.

Putting this question aside, there is here a contract for the

(1) 5 H. & N. 233; 29 L. J. (Ex.) 110. (2) 15 Q. B. 428; 19 L. J. (Q.B.) 382.

sale of goods, and by agreement they are to be delivered before a fair opportunity for inspection arises; for it cannot properly be said that it would be reasonable to hold the defendant bound to examine them when they were delivered to him at half way of the journey. The defendant has a right to inspect the goods, and it seems to me that where the sale is by sample, and inspection is to be at some place after delivery, the true proposition is, that if the purchaser on such inspection finds the goods are not equal to sample, or if they are, in fact, not equal to sample, he has a right to reject them then and there, and is not bound to do more than reject them. There are several modes in which he may reject them, some of which are pointed out by Lord Chelmsford in *Couston* v. *Chapman* (1), in the passage which was cited from his judgment, and which, in my opinion, is to be read not as if cumulative, but as if alternative. He may, in fact, return them, or offer to return them; but it is sufficient, I think, and the more usual course is, to signify his rejection of them by stating that the goods are not according to contract and they are at the vendor's risk. No particular form is essential; it is sufficient if he does any unequivocal act shewing that he rejects them. Here the county court judge thought that there was sufficient notice of the defendant's rejection of the goods, but he supposed himself bound to hold that the purchaser must do more than reject the goods, viz., actually send them back or offer to do so. There is not much authority to be found on the subject, but I think the general understanding has been that this is not necessary. And it appears to me that the dicta of Martin, B., and Bramwell, B., in the case of *Lucy* v. *Mouflet* (2), are right. In the case of *Heilbutt* v. *Hickson* (3) it was held that goods delivered in London, and sent by the purchaser to Lille, might be rejected at the latter place. The rest of the Court in that case rested their opinion on some supposed new agreement, but I ventured to go further, and to say that though primâ facie the inspection of the goods ought to have been in London, and therefore primâ facie and with respect to any obvious defects London was the place for rejection of the goods, yet as the defect was a secret one caused by the plaintiff's workmen, so as by them to be intentionally secret and one that could not by reasonable

(1) Law Rep. 2 H. L., Sc. at p. 256. (2) 5 H. & N. 233; 29 L. J. (Ex.) 110.
(3) Law Rep. 7 C. P. 438.

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skill and care be discovered until the goods were tested at Lille, it was as if the inspection were by the contract to take place at Lille. I stated it as my opinion, therefore, that there was a right to reject at Lille. I still hold by that opinion, and I think that when there is a sale by sample, and the time for inspection is subsequent to delivery, and the place of inspection different from that of delivery, then if the goods are found on such inspection not to be equal to sample, the purchaser has a right to reject them then and there, and it is the duty of the vendor to get them back thence.

DENMAN, J. I am also of the same opinion. At first, I felt some difficulty, in consequence of the way in which the county court judge has reserved the point. The question is not wholly one of law, but depends on questions of fact of which he was the judge. I doubted whether we could overrule his decision on what seems to be a mixed question of law and fact; but it seems to me that the fair construction of the case is, that he thought himself bound by law to find for the plaintiff on the ground that the defendant had not, in fact, returned the goods or done anything equivalent to a constructive return of them. The question the judge seems to have intended to reserve for our opinion is, whether his decision was in this respect right, and if so I think he was wrong, for it seems to me that all the defendant was bound to do was unequivocally to signify that he rejected the goods. I agree with the opinion expressed by my Lord and my Brother Brett in this case, and by Martin, B., and Bramwell B., in the case of *Lucy* v. *Mouflet* (1), that there need not be a return, either actual or constructive, of the goods. It is sufficient if there is, as there was in this case, a clear notice that the goods are not accepted, and are at the risk of the vendor. The only other question raised is, whether there was an acceptance within the Statute of Frauds. On this I express no opinion, as in the event it becomes unnecessary to do so.

Judgment for the defendant.

Attorney for plaintiff: *R. Dickson.*
Attorneys for defendant: *Scott & Co.*

(1) 5 H. & N. 233; 29 L. J. (Ex.) 110.

BIRCHALL *v.* PUGIN.
MOLLOY, GARNISHEE.

1875
April 28.

Attorney's Charge for Costs on "Property recovered"—Attachment of Debts—Priority—23 & 24 *Vict. c.* 127, *s.* 28—*Common Law Procedure Act*, 1854, *s.* 61.

The defendant having recovered a sum of money in an action brought by him against M., B., the defendant's attorney in that action, had taken out a summons for an order charging his costs in such action upon the sum recovered. The plaintiff afterwards, having recovered judgment in his action against the defendant, obtained an ex parte garnishee order attaching the sum recovered by defendant against M. in execution.

Under these circumstances the parties came before a judge at Chambers, B. claiming to have a charging order on the judgment debt as property recovered within the 28th section of 23 & 24 Vict. c. 127, and the plaintiff claiming an order on M. to pay the sum attached to him. The judge made an order in favour of B.:—

Held, that he was right in so doing; that the sum recovered was property within the section, and that the attorney was entitled to priority.

11 C.L.D. 943.

THIS was an application by way of appeal from the decision of Brett, J., at Chambers, refusing to make an order under the 61st section of the Common Law Procedure Act, 1854, that one Molloy should pay two sums of 69*l.* and 110*l.* to the plaintiff. The facts were as follows:—The plaintiff had recovered judgment in the action, and sought to attach in execution two sums of 69*l.* and 110*l.* which were due to the defendant Pugin from Molloy by the award of an arbitrator, to whom an action by Pugin, the defendant, against Molloy, and all matters in difference, had been referred. A Mr. Button had acted as Pugin's attorney in the action of *Pugin* v. *Molloy* and the arbitration. On the 6th of February Button took out a summons at Chambers for an order under 23 & 24 Vict. c. 127, s. 28, charging the costs due to him in respect of the action of *Pugin* v. *Molloy* and the reference upon the sums recovered. Before the hearing of that summons the plaintiff Birchall, having recovered judgment in his action against Pugin, obtained a garnishee order ex parte attaching the two sums of 69*l.* and 110*l.* under the 61st section of the Common Law Procedure Act, 1854. The case then came before Brett, J., at Chambers, when Button claimed to have an order charging his costs upon the sums reco-

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vered as aforesaid, and the plaintiff Birchall claimed an order, under the 61st section of the Common Law Procedure Act, 1854, that Molloy should pay them to him as the execution creditor in the action of *Birchall* v. *Pugin*. After the award in *Pugin* v. *Molloy* had been made, and before the costs were taxed, Mr. Pugin withdrew Button's retainer and employed another attorney.

The learned judge refused to make the order in favour of the plaintiff, as before mentioned, and made a charging order in favour of Button. (1)

Anderson moved for a rule nisi calling on the garnishee to pay the sums of 69*l.* and 110*l.* to the plaintiff. The garnishee order having been served binds the funds in the hands of the garnishee, and the attorney is not entitled to priority: *Hough* v. *Edwards*. (2) The attorney's lien cannot prevail over an attachment of the debt under the Common Law Procedure Act, 1854. In *Eisdell* v. *Coningham* (3) and *Sympson* v. *Prothero* (4) there was notice of the attorney's lien. Here the plaintiff had no notice at the time when the garnishee order was obtained. Secondly, the attorney's right to a charge does not arise until he has completely finished the proceedings in the suit. He ought to get the costs taxed, and recover as much as he can from the other side before coming upon the sum recovered. Thirdly, it is submitted that these funds are not property recovered within the meaning of the Attorneys and Solicitors Act (23 & 24 Vict. c. 127, s. 28). The section refers to specific property recovered as in an action of detinue or real property, not a mere debt or chose in action: *Wilson* v. *Hood*. (5) Fourthly, the Court has a discretion in the matter, and will not

(1) 23 & 24 Vict. c. 127, s. 28:

"In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, &c., it shall be lawful for the Court or judge before whom any such suit, &c., has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature or kind the same may be which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, &c."

(2) 1 H. & N. 171; 26 L. J. (Ex.) 54.

(3) 28 L. J. (Ex.) 213.

(4) 26 L. J. (Ch.) 671.

(5) 3 H. & C. 148.

give the attorney a charge when a garnishee order has been already obtained without notice.

LORD COLERIDGE, C.J. I think there should be no rule. This case comes before us by way of appeal against the decision of my Brother Brett, refusing to make an order under the 61st section of the Common Law Procedure Act, 1854, against the garnishee to pay to the plaintiff Birchall a sum of 179*l.* [His Lordship then stated the facts of the case.] Under these circumstances, the learned Judge in effect decided that the attorney was entitled to priority. It appears to me that his decision was right. One objection made by the counsel for Birchall was that the sum in question was not "property" recovered within the meaning of 23 & 24 Vict. c. 127. s. 28. I am of opinion that that objection cannot prevail. The words used in the section are of the widest possible character, and include all property of whatsoever kind; not only property known to the common law, but property of every kind. It seems to me that this is property of some kind: it is a chose in action. If authority were wanting on the subject, it appears to me that there is abundant authority to be found in the decisions. The case of *Wilson* v. *Hood* (1) was cited as shewing that the section was limited to real property, but the real question in the case was whether realty was included in the section, and the Court held that it was. It was not disputed that personal property of all sorts was within the section. The next question is whether the attorney's claim to a charge on the property is to be defeated by the action subsequently taken under the garnishee clauses of the Common Law Procedure Act. The language of the latter part of the 28th section of 23 & 24 Vict. c. 127, is strongly in favour of the attorney's claim. It is enacted that all acts done to defeat, or which shall operate to defeat, such charge or right, shall, except in favour of a bonâ fide purchaser for value without notice, be absolutely void as against such charge or right. There is, it seems to me, strong authority against the contention of the plaintiff's counsel. In the cases of *Eisdell* v. *Coningham* (2) and *Sympson* v. *Prothero* (3), it was held that the attorney's claim

(1) 3 H. & C. 148. (2) 28 L. J. (Ex.) 213.
(3) 26 L. J. (Ch.) 671.

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to be satisfied his charges out of the property which had been recovered by his exertions was entitled to priority. In the case of *Eisdell* v. *Coningham* (1) the garnishee actually had to refund the money. In the present case either party, in the absence of the other, was entitled to be paid this sum of money; the question is, which is entitled to priority? I think the decision of my Brother Brett, that the attorney, having first taken steps to attach this money in respect of his costs, was entitled to priority, was correct. There is nothing in the objection that the costs in the action of *Pugin* v. *Molloy* had not been taxed by Button. He was dismissed by Pugin, and had no power or authority to do what it is suggested he ought to have done.

BRETT, J. The attorney was the first to take steps to attach the money by taking out the summons for the charging order. That of itself did not operate as a charge, and before the hearing of that summons the garnishee order was made ex parte under the 61st section of the Common Law Procedure Act, 1854. That order does in a sense charge the debt, and the garnishee may voluntarily pay the sum charged to the execution creditor; but by the latter part of the 61st section, if he refuses to pay he must be ordered to appear to shew cause why he should not pay, and a subsequent order must be obtained against him for payment. Consequently in such a case the garnishee order obtained ex parte is not effective without a subsequent order. The state of things was therefore this at the date of the hearing before me. Neither party had perfected his right. Button had a summons to charge the debt only, and Birchall had an order only binding primâ facie and in the absence of cause being shewn to the contrary. Neither party could obtain the money without an order. Under these circumstances it is objected on behalf of Birchall that these sums of money are not "property" within the meaning of the 28th section of 23 & 24 Vict. c. 127. Now it seems to me that they are. Something has been recovered for Pugin by the exertions of Button. That something is the right of immediate payment of two ascertained and specified amounts or sums of money. They are two judgment debts. The words in the section, which are

(1) 28 L. J. (Ex.) 213.

"property of any kind," seem to me to be large enough to cover such a right as Pugin has to these two sums. If Pugin had paid money into his own account at his bankers, the amount would obviously, I think, be property, although the bankers would not be bound to repay or pay out the same coins. These two sums, ascertained by legal decision to be due to Pugin, though still in the hands of Molloy, seem to me to be equally capable of being called property. I think that even before the Act in equity money recovered by a decree was treated as property upon which an attorney would have an equitable lien.

It is also objected that Button, not having proceeded to tax the costs in the proceedings against Molloy, is not entitled to the charge upon the property recovered. I will not say what might have been the effect if there had been no change of attorneys, but Button was dismissed by Pugin after the sums in question had been recovered. It would be a very strong thing to say that under these circumstances he is not entitled to his costs. I think that there was without doubt a debt due to him in respect of which he was entitled to a charge if Birchall's claim were out of the way. The last question therefore is, which of these parties is entitled to priority? Neither of them having completed his right, which is entitled to the preference? I think the judgments in the Admiralty cases, e.g., in *The Jeff Davis* (1), though not absolutely binding, and also the decisions in equity, are strong authorities to shew that when the attorney is the meritorious cause of the recovery of the sum in question, his claim upon it for costs is entitled to priority. On the strength of that equity, neither party having perfected his right, I thought Button was entitled to have his charge upon the money in preference to the execution creditor. Until the execution creditor's position is perfect, I think the Court is bound to prefer the attorney, without whose services there would by the hypothesis have been no fund on which either party could have claimed.

HUDDLESTON, J., concurred.

Rule refused.

Attorneys for plaintiff: *Poole & Hughes.*

(1) Law Rep. 2 A. & E. 1.

1875
May 5.

WELLS *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF KINGSTON-UPON-HULL.

Contract—Corporation—Seal—Interest in Land—Statute of Frauds, s. 4.

The defendants, a municipal corporation, were possessed of a dock of which they allowed the use to ships needing repairs, under certain printed regulations. The plaintiff entered into a parol agreement with the defendants for the use of the dock, upon the terms of such regulations. By these regulations it was provided that the dock should be "let" to parties requiring the same for the repair of vessels at such rates as the council of the borough should from time to time sanction, and that vessels entered in a book kept by the borough treasurer should be allowed to enter the dock, as far as possible, according to the order of entry in the book. The regulations contained provisions that the defendants should be entitled to detain the vessel in the dock until the dockage was paid, that the corporation foreman should open and shut the dock gates, and various other provisions tending to show that the defendants intended to retain possession of and control over the dock while in use by vessels. The defendants did not admit the plaintiff's vessel into the dock in her turn:—

Held, in an action for breach of contract by the plaintiff against the defendants, that the contract was not for an interest in land within the 4th section of the Statute of Frauds, and therefore need not be in writing; and, secondly, that the contract need not be under the seal of the corporation.

DECLARATION for breach of a contract by which the defendants were to allow a certain steamship of the plaintiff to be docked in the defendants' graving dock in her turn, during the execution of certain repairs to the said ship.

Plea (inter alia), denial of the agreement.

The facts, as proved at the trial before Archibald, J., at the Yorkshire spring assizes, 1874, were as follows:—The defendants were a municipal corporation, and were the owners of a graving dock. Certain printed regulations had been established by them for the use of the dock, which were as follows:—

"1. The dock will be let to parties requiring the same for the repair of vessels, at such rates as the council of the borough shall from time to time sanction.

"2. With a view to secure to parties, as far as possible, the use of the dock in the order of priority of application, a book is kept by the borough treasurer at the town hall, in which the names of all vessels intended for repair in the dock must be entered, and, as far as practicable, priority will be given to vessels in the order of

entry, subject, nevertheless, to these regulations; and also, in case of any question as to priority of any vessels, such question shall be determined by the borough treasurer in such manner as he shall see fit, and his decision shall be final.

"3. No changing of turns will be allowed.

"4. No vessel is to be entered in the book except by a written order from the owner or master.

"5. On entering each vessel, a sum of 3*l.* 3*s.* shall be paid to the borough treasurer as entrance money.

"6. The entrance money will be allowed as part of the dockage if the account for such dockage, and moneys payable in respect of the vessel, shall be paid within ten days after the same is sent in. If the account is not so paid, the entrance money will be absolutely forfeited. The entrance money and the right of turn for the use of the dock will also be absolutely forfeited if the vessel does not take her turn at the time specified at the time of entry, or subsequently fixed by notice (written or verbal) given to the owner, master, or other person in charge, or having the docking of the vessel.

"7. The treasurer may, on behalf of the corporation, notwithstanding the preceding regulations, require payment of all dockage or other moneys payable in respect of any vessel before such vessel is allowed to leave the dock, and, to preserve the lien of the corporation, may detain such vessel, and dockage in respect of the vessel will be chargeable during such time as she may be detained in the dock.

"8. The corporation foreman will open and close the dock gates for the docking and undocking of vessels as may be required.

"9. The ground blocks and horizontal shores of the corporation may be used for vessels in the dock, but the parties using the same must take all risks and responsibility in respect thereof, and of selecting and placing the same.

"10. If any injury or damage should be done to the dock, dock gates, engines, machines, blocks, shores, or other property of the corporation, by any vessel or person employed therein or connected therewith, or if any of the blocks or shores are left adrift or lost, full compensation to be assessed and fixed by the corporation surveyor shall be paid by the occupier of the dock or owner of the

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vessel, and the compensation when so fixed shall in like manner as dockage be deemed moneys payable in respect of the vessel, and shall be paid and recoverable accordingly.

"11. The dock must be cleaned out each day at the expense of the vessel occupying it to the satisfaction of the corporation foreman or other person in charge of the dock, and in the event of the occupier of the dock not fulfilling this regulation, the corporation will do the work, and all charges or expenses in respect thereof shall be charged to the occupier of the dock or owner of the vessel and deemed moneys payable in respect of the vessel, and be paid and recoverable accordingly.

"12. The corporation will, for the convenience of parties occupying the dock, afford the usual facilities for using the same, but on this distinct stipulation, that the dock will in all cases be let subject to the parties occupying the same undertaking all risks and responsibilities whatsoever, as the corporation, not being a trading body, will not be responsible for any injury, damage, or detention, however caused, occurring to any vessel while docking, or undocking, or being in the dock, or for any damage whatsoever resulting to the owner of such vessel or any other person connected therewith."

It appeared that the plaintiff had paid to the borough treasurer 3*l.* 10*s.* as entrance money for the ship, according to the regulations, and the ship was entered in the turn book. When the turn of the vessel came, another vessel was admitted in her stead. It was contended for the defendants that, to render the defendants liable, the contract ought to have been in writing, as being a contract for an interest in land within the 4th section of the Statute of Frauds, and that it ought to have been under the seal of the corporation. The verdict passed for the plaintiff, leave being reserved to enter a verdict for the defendants on the above grounds. A rule nisi had been obtained accordingly, against which

Wills, Q.C., and *Mellor*, shewed cause. This case comes within the exceptions to the rule that a corporation can only contract under seal. With reference to matters of ordinary business constantly recurring and matters of urgency, it has been always held

that a seal is not necessary. It would be absurd that every time a ship was to enter the dock for repairs it should be necessary to call a meeting of the corporation for the purpose of affixing the seal. [They cited on this point *Arnold* v. *Mayor of Poole* (1); *South of Ireland Colliery Co.* v. *Waddle* (2); *Mayor of Ludlow* v. *Charlton* (3); *Mayor of Kidderminster* v. *Hardwick* (4); *Austin* v. *Guardians of Bethnal Green* (5); *East London Waterworks Co.* v. *Bailey.* (6)]

Secondly, the case is not within the 4th section of the Statute of Frauds; there is no intention that any interest in the land should be given to the plaintiff; the whole scope of the regulations is that the corporation should retain all rights of property and possession in the dock. [They cited on this point *Smith* v. *Overseers of St. Michael, Cambridge* (7); *Dean* v. *Hogg* (8); *Wright* v. *Stavert* (9); *Watkins* v. *Overseers of Milton-next-Gravesend* (10); *Roads* v. *Trumpington* (11); *Wood* v. *Leadbitter.* (12)]

Maule, Q.C., and *Cave*, supported the rule. There is no exception to the general rule requiring a corporation to contract under seal within which this case can fairly be brought. There is no reason for relaxing the rule on the ground of necessity or urgency in this case, because the borough treasurer, if appointed under seal, could be authorized by the terms of his appointment to affix the seal on behalf of the corporation to any contract that might be necessary.

[They cited on this point *Copper Miners' Co.* v. *Fox.* (13)]

With regard to the second point the plaintiff is in this dilemma. If the licence to occupy the dock is revocable, it was revoked. If it was irrevocable, it must be because it was a licence coupled with an interest. What interest can there be but an interest in the land? *Wright* v. *Stavert* (9) and that class of cases is

(1) 4 M. & G. 860.
(2) Law Rep. 3 C. P. 463; Law Rep. 4 C. P. 617.
(3) 6 M. & W. 815.
(4) Law Rep. 9 Ex. 13.
(5) Law Rep. 9 C. P. 91.
(6) 4 Bing. 283.
(7) 3 E. & E. 383.
(8) 10 Bing. 345.
(9) 2 E. & E. 721; 29 L. J. (Q.B.) 161.
(10) Law Rep. 3. Q. B. 350.
(11) Law Rep. 6 Q. B. 56.
(12) 13 M. & W. 838.
(13) 16 Q. B. 229; 20 L. J. (Q.B.) 174.

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not applicable, for there is not in the case of a servant, or a governess, or the lodger at a boarding-house, a right to occupy any particular room or portions of land. It is contended that this agreement amounts to a demise of the dock. The plaintiff has the exclusive right to all the beneficial enjoyment of the dock while he occupies it. Even if the defendants were by the agreement to retain the legal occupation of the dock, the plaintiff was to have a use of it in the nature of an easement. [They cited on this point *Reg.* v. *Winter* (1); *Webb* v. *Paternoster* (2); *Wood* v. *Lake* (3); *Rex* v. *Inhabitants of Horndon* (4); *Inman* v. *Stamp* (5); *Edge* v. *Strafford* (6); *Reg.* v. *St. Martin* (7); *Selby* v. *Greaves* (8); *Hancock* v. *Austin* (9); *Horsey* v. *Graham* (10); *Taylor* v. *Waters* (11); *Rex* v. *Caversham* (12); *Buszard* v. *Capel* (13); *Mayor of Yarmouth* v. *Groom* (14); *Smart* v. *Jones*. (15)]

LORD COLERIDGE, C.J. This case has been argued at considerable length, but it seems to me that it admits of decision on tolerably plain and simple grounds. The first point, viz. whether a contract in writing was essential, depends on whether, by the terms of the agreement between the parties, it was intended to confer an interest in land, or whether, apart from any intention, the effect of the agreement was such as necessarily to confer such an interest. Now primâ facie it appears to me that such an agreement as this is not what would be generally understood as dealing with an interest in land. In ordinary language it is a contract for the use of a graving dock. It is possible that in a contract for the use of such a dock such an exclusive right to the possession of the dock as to amount to an interest in land might be intended to be given, and then a written contract would be necessary. I cannot think that there was any such intention here.

(1) 2 Salk. 587.
(2) Palm. 71; Popham, 151.
(3) Say. 3.
(4) 4 M. & S. 562.
(5) 1 Stark. 12.
(6) 1 C. & J. 391.
(7) 3 Q. B. 204.
(8) Law Rep. 3 C. P. 594.
(9) 14 C. B. (N.S.) 634; 32 L. J. (C.P.) 252.
(10) Law. Rep. 5 C. P. 9.
(11) 7 Taunt. 374.
(12) 4 B. & C. 683.
(13) 8 B. & C. 141.
(14) 1 H. & C. 102; 32 L. J. (Ex.) 74.
(15) 15 C. B. (N.S.) 717; 33 L. J. (C.P.) 156.

The terms of the regulations seem to me altogether inconsistent with the notion that the parties intended to give an interest in the land itself, or that the agreement between them amounted to the giving of such an interest. The mere use of the word "let" in the first regulation, and the words "occupiers of the dock" in some of the other regulations, is not of itself sufficient to create such an interest. It is obvious that they are not used as terms of art according to a strict unalterable legal signification, and they must be construed in connection with the whole of the document. The provisions that priority is to be given according to the order of application only so far as possible, and that the borough treasurer is to decide all questions that may arise as to priority, and that his decision shall be final, do not seem very consistent with the notion that an absolute and exclusive interest in land was to be given as suggested. Down to the 7th regulation there is, at any rate, nothing inconsistent with the dock remaining in the possession and under the control of the corporation. The 7th regulation provides that the vessel may be prevented from leaving the dock if the dockage is not paid: in other words, the supposed tenant is not to be at liberty to walk out of the tenement the exclusive possession of which is supposed to have been demised to him. The only way of preventing this would be by the corporation's locking the gates, for an injury to which it was suggested in argument trespass would lie by the shipowner. It seems to me that the right to do such an act is the strongest possible evidence of the intention to preserve the authority of the corporation over the dock. By the 8th regulation again the corporation foreman is to open and shut the dock gates. So that the supposed tenant is not to have power to open and shut the doors of the tenement supposed to be demised to him. The provisions as to use of the blocks, shores, &c., and as to damage done to the property of the corporation, seem to point to the same conclusion, viz. that the intention is that the contract shall be for the use of the corporation's property, but not for the grant of the occupation or possession of the land. The 11th regulation speaks of the corporation foreman or other person in charge of the dock. Judging of the intention from all these provisions

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taken together, I should say that the defendants plainly never meant to part with the possession of or control over the dock; the contract is merely for the use of the dock in a certain way and on certain terms while remaining in their possession and under their control. I can see nothing in any of the words of the regulations which, apart from the general intention apparent in the whole of them, necessitates our giving the agreement the effect contended for by the defendants. It seems to me that the view we take is well within the authority of the decided cases. In the case of *Smith* v. *Overseers of St. Michael, Cambridge* (1), very strong words indeed were construed as not having the effect of taking the possession or property out of the party contracting. It is true that that was a rating case, and, therefore, not precisely in point, but the principle laid down in the judgments seems applicable to the present case. Hill, J., says: "We must look not so much at the words as the substance of the agreement, and taking the whole together, we think it must be construed not as a demise of five rooms, but as an agreement by which the appellant, retaining possession of those rooms and keeping his servant there, bound himself to supply the other party there with fire, gas, and attendance. It is true exclusive enjoyment of the rooms is to be given, but that is the case where a guest in an inn or a lodger in a house has a separate apartment, or where a passenger in a ship has a separate cabin; in which case it is clear the possession remains in the innkeeper, lodging-house keeper, or shipowner." So here, looking to the substance of the agreement, I think there was no intention to pass an interest in land. The case of *Wright* v. *Stavert* (2) is also strongly in point. I adopt the words of Hill, J., in the case where he says: "The defendant's position here is directly analogous to that of a domestic servant or a governess, or a person employed to build a house upon another's land; all of whom have a right incidental to their respective contracts to go upon land in order to carry out their contracts, but none of whom take under their contracts any interest in the land upon which they are entitled to go." These words seem exactly to hit the distinction between the cases within and those not within the

(1) 3 E. & E. 383. (2) 2 E. & E. 721; 29 L. J. (Q.B.) 171.

statute. Here I think the defendants did not intend to confer any interest in land, though they did give plaintiff a right to go on to the land in order to carry out the contract. I do not think we are called on to discuss the nice question raised upon the effect of *Wood* v. *Leadbitter* (1) in Mr. Cave's ingenious argument, viz. as to whether the plaintiff was a licensee without an interest, and so must fail, because the licence had been revoked; or a licensee with an interest, and so the licence, being irrevocable, amounted to an interest in land. The dilemma suggested does not, as I think, arise. The contract did not relate to the possession or enjoyment of the land or any right over it, but only to the use of it under very stringent regulations, the defendants retaining themselves complete possession of and all rights over it.

The second question is, whether the contract required a seal. There is no doubt a distinction between trading and other corporations; but I can find no authority for the position that a municipal corporation, when engaged in any trading transaction, is to have the same immunity as a corporation created under an Act of Parliament for the very purpose of trading. I treat this case as that of a municipal corporation, and one to which the exception in favour of trading corporations is inapplicable. But on reference to the authorities it will be seen that from the very earliest times certain exceptions to the rule that required a seal were established. These are very conveniently summarised in the judgment in *Church* v. *Imperial Gas Light Company*. (2) The law, as there laid down, is cited by the Court of Exchequer with approval in the case of *Mayor of Ludlow* v. *Charlton* (3), a case in which the Court took a view adverse to the right of persons contracting with corporations without a seal. The principle laid down is that "wherever to hold the rule applicable would occasion very great inconvenience or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring or too insignificant to be worth the trouble of affixing the common seal, are established exceptions." It appears to me

(1) 13 M. & W. 838. (2) 6 A. & E. 846, at p. 861.
(3) 6 M. & W. 815, at p. 822.

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that this case comes well within the description there given of the kind of acts which may be done by a corporation without their seal. The admission of a ship into the dock was a matter of frequent ordinary occurrence, and in some cases it might be a matter of urgency admitting of no delay. For these reasons I am of opinion that the rule should be discharged.

DENMAN, J. I am of the same opinion. In considering the question whether this was a contract for an interest in land within the Statute of Frauds, I think the Court ought to look to the substance of the whole agreement which arose upon payment of the entrance money on the terms of the regulations, and not to isolated expressions in such regulations, such as the use of the word "let" in connection with the dock. It would be an absurd mode of construction to take such a word as conclusive in one direction in such a document as this, when other expressions subsequently occur which point the other way. A good illustration is afforded by the very first regulation, where the word "let" is employed; but when we come to the consideration instead of the word "rent," which would be appropriate in the case of a demise, we find the word "rate." Many other such observations occur with relation to the terms of the regulations, but it is unnecessary to go through them in detail. It seems to me that, looking to the whole of the agreement, it does not amount to a demise of the dock or a contract for an interest in land, but only to an agreement for the use of the dock for repairing the ship, subject to the control of the corporation, and without depriving them for a moment of the full right of possession and property over it. To apply the tests that have been suggested, it appears to me that it would be idle to say that the plaintiff had such an occupation as would be rateable, or that he could bring trespass, or that he would have any other right of action in respect of the land except upon the agreement.

It is unnecessary for me to go through the decisions on the subject. The case of *Wood* v. *Lake* (1) is the nearest to this; and I cannot find that, with reference to the point we are now deciding, it has ever been overruled. It was questioned in *Wood* v. *Lead-*

(1) Say. 3; 13 M. & W. 848, n. (a).

bitter (1), but only so far as it might be considered to be a decision on the question of the necessity for a seal; and Lord St. Leonards is stated to have been dissatisfied with it, but it does not appear to have been overruled. If it is to be considered as a binding authority, I think it concludes the present case. With regard to the second point, I agree that there was no necessity for a contract under seal. The exceptions to the general rule that a corporation can only express its will by means of its seal are very well set out in Chitty on Contracts, 6th ed. p. 251, citing from the judgment in *East London Waterworks Co.* v. *Bailey.* (2) One of the exceptions there given is "where the acts done are of daily necessity to the corporation." I think the act done here fairly comes within the meaning of that exception. The term "daily" must be construed only as applicable to many of the particular matters of business forming examples of the exception, and not as limiting the exception exclusively to acts strictly of "daily" necessity. The business of the dock could not be carried on without great inconvenience by the corporation if, on every occasion when a ship was to be let into the dock for repairs, a contract under seal was necessary. The fourth exception given is where the acts to be done must be done immediately, and where it would be impossible to wait for the formality of the corporation seal. It would probably be very often almost impossible, as a matter of business, that vessels should be kept waiting to enter the dock until a contract under seal could be executed. There is a distinction, no doubt, between trading and municipal corporations, but the exceptions to which I have referred apply to municipal corporations. In truth, the same general principle seems to govern the principle of exception applicable to both trading and municipal corporations alike. Best, C.J., in *East London Waterworks Co.* v. *Bailey* (2) says, "The principle of necessity applies to corporations created for purposes of trade, such as the Bank of England." And he then goes on to shew how the principle of necessity applies to trading corporations. Though he recognises the distinction between trading corporations and others, the ground he seems to put it upon is, that the principle of neces-

(1) 13 M. & W. 838. (2) 4 Bing. 283.

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sity which applies to all corporations alike, only authorizes trading corporations to do certain acts without using their seal, because such acts are necessary for the very purpose of their existence, which is not the case with other corporations. I am disposed to think that the supposed distinction in the cases between trading corporations and others amounts to no more than this.

However this may be, I am of opinion that the present case falls within the exceptions from the rule that are applicable to municipal corporations.

HUDDLESTON, J. I am of the same opinion. As to the first question, viz. whether this contract must be in writing, we have to consider whether the parties intended to create or the terms of the agreement did in fact create the relation of landlord and tenant, or give an exclusive right to the occupation of the dock, or any other such right as would amount to an interest in land within the statute. It seems to me clear that there was no intention that the dock should be in the exclusive occupation of the plaintiff as tenant, and I do not think, when the whole of the regulations are looked at, that anything in the nature of an interest in the land was created. It is contemplated that some one will always have the charge and management of the dock on behalf of the corporation. The case of *Watkins* v. *Overseers of Milton* (1) seems to illustrate the plaintiff's contention very well. There the appellant had granted to him a right to have his hulk moored in a particular spot, and he was held not to be subject to a rate in respect of the occupation of such moorings. Mellor, J., says: "I think the agreement is only a personal licence to the appellant to moor his hulk to the moorings, and although no other person could interfere with that right, and the conservators could not allow anybody to do so without bringing an action against them, yet the agreement only amounts to this, 'I give you liberty to moor the hulk there, and I will not give liberty to anybody else.' I do not think the fact that the appellant has the exclusive use of the moorings makes any difference." So here it appears to me the agreement only amounts to this,—"You may come into the dock, and may

(1) Law Rep. 3 Q. B. 350.

have the exclusive use of it in your turn, and for that use of it you shall pay so much." Moreover, the defendants are to have a lien on the ship for the dockage. All the authorities shew that an agreement of this kind does not amount to a contract for an interest in land so as to be within the statute.

As to the second point, I agree with what has been said by the rest of the Court. Lord Denman, C.J., in the case of *Church* v. *Imperial Gas Co.* (1), thus laid down the law: "The general rule, however, has from the earliest traceable periods been subject to exceptions, the decisions as to which furnish the principle on which they have been established. This principle appears to be convenience amounting almost to necessity." The case of *South of Ireland Colliery Co.* v. *Waddle* (2) may also be referred to as an authority, for though that was the case of a trading corporation, the principles which govern the exceptions to the general rule in the case of all corporations were exhaustively set forth. Again, in *Austin* v. *Guardians of Bethnal Green* (3) the same principles were affirmed. It appears to me that, according to the authority of all these decisions, the present is one of those cases which come within the exception and not the rule.

Rule discharged.

Attorneys for plaintiff: *Pritchard & Sons, for Stearfield.*
Attorneys for defendants: *Collyer-Bristow & Co.*

(1) 6 Ad. & E. 846.
(2) Law Rep. 3 C. P. 463; Law Rep. 4 C. P. 617.
(3) Law Rep. 9 C. P. 91.

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May 11.

[IN THE EXCHEQUER CHAMBER.]

MAVRO AND ANOTHER *v.* THE OCEAN MARINE INSURANCE COMPANY.

Marine Insurance—"General Average as per Foreign Statement"—"Warranted free from Average unless general"—Voyage broken up before Arrival at Port of Destination.

A policy of insurance on a cargo of wheat shipped from Varna to Marseilles contained the usual memorandum against average unless general, and the following term "general average as per foreign statement."

The ship, after starting from Varna, met with heavy weather, and was forced to carry a great press of canvas to avoid a lee shore. This caused her to strain very much, and having sprung a leak and become otherwise disabled, she was brought to the port of Constantinople. It was found, on a survey, that a fifth of the wheat had been damaged; and the surveyors recommended that the voyage should end at Constantinople, and the damaged part of the wheat should be sold, and the rest transhipped to Marseilles. It appeared that the repairs necessary for the ship would have taken from one to two months. Under these circumstances, the recommendation of the surveyors was carried out and an adjustment of average in respect of ship and cargo was made at Constantinople. In such adjustment the damage which the cargo of wheat had sustained was treated as general average, and in accordance with such average adjustment a certain sum of money became payable by the underwriters upon the policy. The law by which the adjustment ought to have been regulated according to the law and usages prevailing at Constantinople under the circumstances was the law of France, and the average adjustment was made up in all respects in conformity with such law. In an action on the policy by the owners of the wheat, the defendants paid into Court sufficient to cover the plaintiffs' claim on all the items of the average adjustment except the damage to the wheat which, by the law of England, would not under the circumstances be a general average loss:

Held, in a special case stated in the action (affirming the decision of the Court below), that the voyage was rightly brought to an end at Constantinople, and the average adjusted there, and that the defendants were liable in respect of the damage done to the wheat.

ERROR from the judgment of the Court of Common Pleas, upon a special case in favour of the plaintiffs.

The facts are set out in the report of the case in the Court below. (1)

Butt, Q.C., for the defendants, contended, first, that the terms in the policy "general average as per foreign statement," only made

(1) Law Rep. 9 C. P. 595.

the underwriters liable in respect of sums of money the assured might have to pay under foreign average adjustments, and that to give it any further effect would be to make it contradict the well-known meaning of the memorandum against average unless general; secondly, that the average adjustment ought not to have been made at Constantinople, but at Marseilles.

[He cited *Simonds* v. *White* (1); *Harris* v. *Scaramanga.* (2)]

Watkin Williams, Q.C. (with him *McLeod*), for the plaintiffs, were not called upon.

COCKBURN, C.J. I think the judgment of the Court below should be affirmed. Two questions are raised by this case. The first is, whether the loss sustained by the plaintiff is a loss within the terms of this policy: the second is, whether in this case the adjustment was properly made at Constantinople instead of at Marseilles, the port of destination. The first question altogether turns on the terms of the policy. There is the usual clause in the policy whereby the goods were warranted free from average unless general, or the ship was stranded. And there is also the term "general average as per foreign statement." Mr. Butt contends that, with respect to this particular case, the question whether the loss was particular or general average is to be determined by English law, notwithstanding the clause that general average is to be as per foreign statement. This does not appear to me to be a satisfactory construction. I do not see how that clause is consistent with the contention that the question whether this is general average is to be determined according to English law. The only sensible construction appears to be this: the underwriter is only to be liable for a general average, but what is general average is to be determined by the law of the foreign place to which the ship is bound. Now, it is admitted that this is a general average loss according to the foreign law, though not according to the English.

The contention that the extent to which the underwriter is to be liable in respect of general average according to foreign law is confined to what the owner of cargo has to contribute in respect of a general average loss, was not, I think, maintained. It follows,

(1) 2 B. & C. 805. (2) Law Rep. 7 C. P. 481.

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therefore, if this was a general average loss according to foreign law, that it is recoverable under the policy. There remains, however, the question whether the adjustment was properly made at Constantinople. That depends on whether the voyage was properly put an end to there. The adjustment must be made at the port of destination, if it be reached, but if the voyage is interrupted by some supervening cause, which necessitates or justifies its termination at some intermediate place, that place is the proper place of adjustment. The vessel here was compelled to put into Constantinople in consequence of sea damage. Repairs were necessary which must take a long time. It is admitted that the damaged portion of the cargo was properly sold, but it is said that the rest ought to have been taken on if the master could possibly get the ship repaired. It is laid down by high authority that it is the master's duty to repair the ship and proceed with the voyage, if it can be done within a reasonable time, and at a reasonable cost. But the repairs here took two months, and this statement of the master's duty refers to his duty as between himself and the shipowner. He has also a duty as agent of the cargo-owner, if the voyage is interrupted by a supervening necessity. Looking at the delay that would have occurred, the captain did, in my opinion, exercise a sound discretion in terminating the voyage at Constantinople. I do not rest my judgment on what took place in the Consular court. I have grave doubts as to whether those proceedings were within the jurisdiction of the Consular court, though I express no definite opinion on the point. My judgment on this point rests on the ground that the voyage was properly determined at Constantinople. If I could see any sensible difference had been caused to the position of the underwriter, I should have thought there was more foundation for Mr. Butt's argument; but it appears to me that the meaning of the statement in the case is that the average stater at Constantinople made the adjustment in conformity with the law of France, taking into consideration the interruption of the journey at Constantinople and all the circumstances of the case. This being so, I do not see how the underwriter was injured by the statement being made at Constantinople.

BRAMWELL, B. I am of the same opinion. As I understand

the defendants' contention, it is that the words "general average as per foreign statement" only make the underwriter liable in respect of a contribution which the cargo-owner has to pay to such a general average loss by foreign law, but, except to that extent, do not make him liable in respect of any loss that would not be according to English law general average. That contention is founded on the memorandum by which the corn is warranted free from particular average, and it is said that the effect would be that the plaintiffs would get compensation for what is particular average by our law, and the warranty would be rendered ineffective if the plaintiffs' contention were correct. Now, it is not correct to say that the warranty would be rendered inoperative. There is no repugnancy in the plaintiffs' contention. The corn is warranted free of general average, but the question what is general average is to be determined as per foreign statement, that is as a foreign average adjuster would state it. The difficulties in the way of any other contention seem to me insuperable. It would be impossible to adopt the foreign rule as to what the cargo-owner was to contribute and exclude it as to other matters. With regard to the question whether the average loss was properly adjusted at Constantinople, I also think the judgment below should be affirmed.

BLACKBURN, J. I also am of opinion that the decision of the Court below should be affirmed. Long before a policy of insurance was thought of, by the law of the Rhodian Republic it was laid down that where there was a common adventure of the property of several, if it became necessary in consequence of perils of the sea purposely and intentionally to sacrifice part of the property adventured for the preservation of the rest, the owners of the property preserved should contribute to the loss of the owner of that which was so sacrificed for the common benefit. This law has since been adopted in the code of every civilised country, but unfortunately there has been a difference in different countries as to what ought to be considered a sacrifice for the common benefit, and consequently a general average loss. The law of England does not consider when a stress of canvas is put on to avoid a lee-shore, and the ship is thereby strained, and water gets in to the

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damage of the cargo, that there is any intentional sacrifice made of part of the property imperilled, for the good of the common adventure. It is not necessary now to say which law is the wisest. It is enough to say that, according to the law in France and at Constantinople, this would be a general average loss, though by English law it would not. What is the effect of this state of things as applied to the language of this policy? There is the usual memorandum that is found in English policies, viz. that corn among other things is warranted free from average, unless general, or the ship be stranded; that is, the underwriters will not be liable for any but a total loss, unless the partial loss arises from the stranding of the ship, or unless such partial loss is one which is occasioned by a sacrifice made for the benefit of the whole adventure. It does not say that the underwriters will bear a partial loss by reason of a contribution to a general average loss, but that they will bear a general average loss. In an ordinary English policy the words "general average" would refer to that which was according to English law considered a sacrifice for the general good. But inconveniences were found to arise in this respect, because when vessels were bound to a foreign country it frequently happened that the ship and cargo were taken possession of by a foreign court of admiralty, and the adjustment of average took place according to the foreign law. It is a question that has never distinctly been settled, whether under an ordinary English policy in such cases the English underwriter could be compelled to bear what was held to be a general average loss by the law of the foreign country. To avoid this difficulty, express clauses have been inserted in policies. Some of such clauses have been framed on the footing that when the vessel was caught in a foreign country, and contributions had to be paid, the underwriters should bear those payments. The defence here proceeds on the notion that such is the meaning of the present policy. I think that, though it might have been so framed, it is not. I construe the words "general average as per foreign statement" to mean that general average in the policy shall include such losses as the French law regards as intentional sacrifices made for the benefit of the whole adventure, not only such losses as a foreign average adjuster shall actually state. Putting aside the question whether

the Consular court at Constantinople had jurisdiction to do what it did, which in my view is immaterial, the next question is whether Constantinople was the proper place at which to adjust the average. With respect to that, I agree with what my Lord has said. I look upon the statements in the case as meaning that, in the average statement at Constantinople, the figures were correctly worked out according to French principles.

POLLOCK, B. I am of the same opinion. If the construction put on this policy by the Court below had the effect, as suggested, of making the clause "general average as per foreign statement" entirely destroy and obliterate the warranty against particular average, I should hesitate before affirming the judgment, as that would be contrary to the well-known canon that requires a meaning to be given to every part of an instrument, if possible. I do not, however, think the effect suggested is produced. The object of the clause against average, unless general, is to prevent claims for partial damage with respect to various articles. Full effect is given to this, according to the plaintiffs' contention. All that they seek to do is in interpreting the meaning of "general average" in the memorandum, to read in the other clause "general average as per foreign statement." I look upon the reasonable construction as being, that "general average" in this policy means general average according to foreign, not English, rules.

AMPHLETT, B. I am of the same opinion. The defendants' argument is, that under the words "general average as per foreign statement," any additional burden thrown upon the owners of cargo by foreign law comes within the policy; and so, if this loss were a contribution by cargo to ship, the underwriters could not resist payment of it; but that, if the loss be one sustained by the cargo itself, as that by the English law would fall upon the owner of cargo under the circumstances, it is particular average only and is excluded by the memorandum. The contention is that such a loss is not an extra loss caused by reason of a foreign statement. The reason of the thing does not point to such a construction of the policy. Suppose the cargo to have belonged to two owners, the plaintiff and another, and damage had been

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caused to that part belonging to the other owner, the plaintiff's part of the cargo would have had to contribute according to French law. Such a case would come within the terms "general average as per foreign statement," even according to the defendants' contention, and the underwriters must have borne the loss. What difference, substantially, does it make that the cargo all belonging to one owner, no such contribution is made? Nevertheless the clause might, no doubt, have been so worded as to give rise to Mr. Butt's argument. Looking, however, to the words used, I agree that the meaning is, that although average is not to be recoverable unless general, what is general average is to be determined by the rules of the foreign law.

Judgment affirmed.

Attorney for plaintiffs: *Nash.*
Attorneys for defendants: *Waltons, Bubb, & Walton.*

May 12.

[IN THE EXCHEQUER CHAMBER.]

PHILLIPS *v.* MILLER AND ANOTHER.

Vendor and Purchaser—Sale of Real Property—Incumbrances—Terms of existing Tenancies, Notice of—Agreements collateral to Tenancies.

Part of an estate consisted of three farms in Hampshire, and, in that county, valuations between outgoing and incoming tenants for hay, straw, and manure, are made at "fodder value," which is lower than what is called "market value." The three tenants of the farms held under verbal agreements, from year to year, according to the custom of Hampshire. The defendants were devisees of the estate in trust for sale, and, in contemplation of a sale, they gave notice to the tenants to quit at Michaelmas, 1869. The tenants alleged that they had been promised leases by the devisor, and although there was nothing to shew that such promises were binding in law or equity, the defendants, thinking the claim binding in honour and conscience, entered into agreements with the tenants, by which, in consideration of their giving up possession of their farms according to the notices, the defendants promised to remit the half-year's rent due at Michaelmas, 1868, to pay 100*l.* to the tenant, and to pay for hay, &c., at the termination of the tenancy, at "market value." In June, 1868, the estate was put up for sale by auction. In the particulars and conditions of sale the three farms were described as in the occupation of the tenants respectively till Michaelmas, 1869, at certain rents, and certain incumbrances, subject to which the sale was made, were specified, viz. land-tax and tithe rent-charge; but no express mention was made of the above-mentioned agreements with the tenants. The conditions stipu-

lated that the property should be taken to be correctly described as to quantity and otherwise, and that if any error, misstatement, or omission should be discovered, the same should not annul the sale, nor should any compensation be allowed, and that the rent or possession should be received or retained and the outgoings discharged by the vendors up to the 29th of September and from that day by the purchaser. The property was bought in at the sale by auction, and afterwards sold by private contract on the 18th of July, 1868, to the plaintiff. The contract described the property as in the foregoing particulars, and as being purchased subject to the foregoing conditions. At the time of the purchase the plaintiff had no knowledge of the above-mentioned agreements with the tenants. Upon his becoming aware of and objecting in respect of them, it was agreed that he should complete without prejudice to his claim to be indemnified in respect of the agreements to pay market value for the hay, &c. The plaintiff afterwards paid the tenants the amount of the valuations of hay, &c., at market value, and now sought to recover the difference between that and fodder value from the defendants:—

Held (reversing the decision of the Court below; Amphlett, B., dissenting), that the agreements with the tenants to pay market value were collateral agreements binding only on the defendants personally, and did not amount to fresh demises; and that by the arrangement between the parties, the plaintiff, having paid the tenants' claims, could recover the difference between market and fodder value from the defendants as money paid for their use.

Per Amphlett, B., the agreements amounted to fresh demises, as to which there was no duty cast upon the defendants to disclose the terms of them to the plaintiff, and as to which a Court of equity would not enforce compensation against the vendors; and, consequently, that the action was not maintainable.

ERROR from the judgment of the Court of Common Pleas in favour of the defendants. The facts of the case appear in the report of the case in the Court below. (1)

Channell, for the plaintiff, contended that the agreements with the tenants to pay market value were personal only, and did not create new tenancies on the terms that market value should be paid; that, consequently, the defendants ought to have paid the tenants the difference between market and fodder value, and that the effect of the arrangement between the parties was that the payment by the plaintiff of such difference was a payment for the use of defendants at their request.

Herschell, Q.C., for the defendants, contended that the effect of the agreements was to create fresh tenancies on the terms of the agreements and the former tenancies, except so far as altered by the agreements. [The Court then intimated to him that he need not argue the other questions in the case.]

(1) Law Rep. 9 C. P. 196.

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In addition to the authorities referred to in the judgment, *Johnstone* v. *Hudlestone* (1) and *Gore* v. *Wright* (2) were cited.

The arguments and authorities cited sufficiently appear from the judgments.

Cur. adv. vult.

May 12. The following judgments were delivered:—

AMPHLETT, B. This is an appeal from the judgment of the Court of Common Pleas upon a special case, by which the plaintiff was denied any relief in respect of the difference between market and fodder values of hay, straw, and manure, which he had been obliged to pay to three tenants of an estate purchased by him from the defendants.

The facts of the case are fully stated in the judgment of Lord Coleridge in the Court below (3), and I do not consider it necessary to repeat them here.

The question in some of its aspects depends upon the true construction of the agreements of the 11th of May, 1868, entered into between the defendants and the three tenants respectively, who were then under notice to quit at Michaelmas, 1869. There was some difference, but not of much importance, in the language of such agreements, but that which was entered into between the defendant and Mr. Parker, the principal tenant, and to which I will mainly confine myself, was as follows:—

"Memorandum. Whereas it is alleged by Robert Parker, of Headley, Hampshire, farmer, that the late Sir Charles Hayes Miller, of Froyle, Hampshire, Bart., agreed to grant to the said Robert Parker a lease of the farm, lands, and hereditaments at Headley, aforesaid, and at Frensham, in the county of Surrey, now in his occupation. And whereas the trustees of the will of the said Sir Charles Hayes Miller have served a notice upon the said Robert Parker, requiring him to quit and deliver up to them, on the 29th day of September, 1869, the said hereditaments. And whereas the said several parties have agreed to enter into the arrangement hereinafter appearing. Now be it known that in pursuance of the said agreement, and for the sake of preventing

(1) 4 B. & C. 922. (2) 8 A. & E. 118.
(3) Law Rep. 9 C. P. 201.

disputes and differences, and also in consideration of the agreement for remission of rent by the said trustees hereinafter contained, the said Robert Parker hereby agrees to deliver up to the said trustees, as aforesaid, or their assigns, or other the person or persons for the time being entitled to the freehold of inheritance of the said hereditaments, on the 29th day of September, 1869, possession of the said farm, lands, and hereditaments held by him as aforesaid; and in further pursuance of the said agreement, and in consideration of the said Robert Parker agreeing to relinquish possession of the said hereditaments as last aforesaid, the said trustees hereby agree to allow or remit to the said Robert Parker the half-year's rent which will become due to them in respect of the said hereditaments on the 29th day of September, 1868, and also to pay to him on the said 29th day of September, 1868, the sum of 100*l.*, and also to *pay* or *allow* to the said Robert Parker on the said 29th day of September, 1869, *or at the termination of his tenancy*, for all the hay, straw, and manure produced on the farm during the preceding year, at market value."

At the conclusion of the argument of the plaintiff's counsel in support of the appeal, the Court expressed an opinion that if the arrangement as to the market value was to be taken as a term of the holding or incident to it, the judgment of the Court below was right. It was, however, contended on the part of the plaintiff, that according to the true construction of the agreement, such arrangement was in truth not a term of the holding or incident to it, but a collateral agreement binding the defendants personally, and not the land, and since in that case different considerations may arise as to the right of the plaintiff to recover in the action, it becomes necessary to determine whether such contention is tenable.

Now, the first thing to be observed is that the arrangement as to market value was undoubtedly a change in one of the terms of the original holding, and, as Lord Denman said in *Doe* d. *Monck* v. *Geekie* (1) (where there had been a change of rent), the common-sense view of the transaction would appear to be, that, although there may have been a new contract, its terms must have been understood to be that all was to go on as under the old contract, except as to the valuation at the determination of the tenancy.

(1) 5 Q. B. 841.

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It is said, in opposition to this view, that other parts of the agreement, as for instance the payment of the 100*l.*, was clearly collateral (which is true), but I fail to see what difference that makes. There would be no inconsistency in a landlord saying to his tenant, "Accept the notice to quit, and I will give you 100*l.* down, and improve your position as tenant by altering some of the terms of your holding." But then it was said that, to render valid a new contract, such as I have mentioned, when any change is made in the terms of the holding, there must be a surrender in law of the old contract, and that there was here no sufficient acceptance by both parties of the new contract to admit of such surrender. I am unable to follow this argument, because it appears to me that the signature of both parties to the agreement is the most satisfactory evidence of their acceptance that could be given.

No doubt a surrender in law of the old contract was not in the contemplation of either party, but that, as Baron Parke said in *Lyon* v. *Reed* (1), is unnecessary. What is material to inquire into is, whether it can be made out from the terms of the agreement that it was intended that the tenant should receive market value, on the termination of his tenancy, from his landlord, whoever he might be, and I think it can. For I can see nothing in the agreement itself to limit the tenant to a remedy against his existing landlord, and if we look to the consequences of such a construction, it is hardly credible that such could have been the intention of the parties. For what, on this construction, would be the position of the tenant at Michaelmas, 1869, in the event which happened? He might clearly be forced to leave his produce on his farm on receiving fodder value, and for the rest of the market value he would lose the lien which an outgoing tenant always has on his produce, and have to look only to the personal security of the vendor, who might have become insolvent. Nor would the vendor's position be a more pleasant one, or more likely to have been contemplated; for he would not know, until Michaelmas, 1869, arrived, how much he would have to pay, since it would be at the will of the tenant, within certain limits, how much produce he would leave, and the tenant would in most cases leave much more than he would have done if holding at fodder value.

(1) 13 M. & W. at p. 306.

Suppose, again, the vendor, under these circumstances, should die without selling before Michaelmas, 1869, either intestate or having devised the estate; the consequence of the arrangement as to the valuation being collateral would be that, not the heir or devisee, but the personal estate would have to bear the difference between the market and fodder values, and the tenant would, as before, be able to increase or diminish the amount at his pleasure.

Again, suppose that the vendor did not sell, and survived Michaelmas, 1869, and then by receipt of subsequent rent, or otherwise, waived (as he might do) the notice to quit, can it be doubted that the tenant would be entitled to be paid market value at any future time when he left his farm? If the vendor afterwards sold, or died as before, and the purchaser, or heir, or devisee (as the case may be) did not signify his dissent to the continuance of the tenancy by giving notice to quit, the tenant would, according to *Buckworth* v. *Simpson* (1), continue on the same terms. And these terms, by the hypothesis, are to leave produce at fodder price. When, then, should the vendor or his executors pay the difference? It must be either at the time when a new contract is implied between the tenant and his new landlord, or at the final termination of the tenancy, which might be years afterwards.

Either alternative would, I think, be found inconvenient, and, from its novelty alone, objectionable.

Still further, if it were held that the provision as to market value was collateral only, and did not bind the land, it would follow that, notwithstanding actual notice of the agreement to the purchaser before he entered into his contract, he would not be bound by the provision. This would certainly be a most startling result.

So also with regard to the forty-five acres in Surrey, where the custom of the country is for the tenant to receive market value, can it be right that a purchaser who is supposed to have bought on the faith of the tenancy being on the customary terms, should receive the difference between that and fodder value? Yet this would appear to be the necessary result of the plaintiff's contention.

(1) 1 C. M. & R. 834.

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All these anomalies and difficulties would disappear, and justice be done to all parties, including, as I think I shall shew, the purchaser, by simply adhering to the ordinary rule that a provision of this kind so intimately connected with the tenancy is part of its terms, and binds the land.

For the above reasons, I am of opinion that the contention of the plaintiff that the provision was collateral only cannot be sustained. It was urged by Mr. Herschell that if the provision was collateral only, and did not bind the land, the plaintiff had nothing whatever to do with it, and that any payment he may have made under it was in his own wrong, and could not be recovered in this action. I should be sorry to be obliged to rest my judgment on such a technical ground; and I am disposed to agree with my Brother Blackburn that by virtue of the arrangements come to between the parties on the completion of the contract, and on the settlement of Parker's action, the payment would, in the case supposed, be held to have been made at the defendant's request.

It only remains for me to give my reasons for agreeing with the rest of the Court, that, if I am right in the construction I have put upon the agreement, the plaintiff is not entitled to recover anything in this action.

The plaintiff's right, if any, to an "indemnity" (which word may, I think, be fairly taken to include what is more properly called "compensation") is reserved to him by the agreement of the 6th of January, 1869, or it would have been extinguished both at law and in equity by the conveyance. Had the plaintiff then any such right while the contract remained in fieri? That must depend upon whether, under the circumstances of this case, there was any duty cast upon the defendants to disclose to the plaintiff that the tenants were entitled to be paid for their produce at market price. I think there was not. There was no fraudulent concealment or misrepresentation of the fact which was publicly mentioned at the auction; and it appears to have been a mere accident that it was not known to the plaintiff. The names of the tenants, and their rents, and the time their tenancies determined were disclosed, and the plaintiff therefore had ample opportunity of ascertaining all the particulars respecting them which he required; and considering that the estate lay in two counties, in one of which the custom

of the country gave the tenants fodder price and the other market price, I think that the plaintiff ought to have inquired which custom prevailed on the estate he was going to purchase, if it was thought at the time of any real importance. Under these circumstances, I think it quite clear that a court of equity would not have enforced either indemnity or compensation against the vendors, although it possibly might have refused a decree of specific performance at their suit, unless they consented, as regards the lands in Hampshire, where the custom of fodder value existed, to give such indemnity or compensation.

The view which the courts of equity have taken of cases of undisclosed rights of tenants as between vendor and purchaser in the absence of fraud or misrepresentation appears to be this. If those undisclosed rights are trifling in their character, and the purchaser might with a little exertion have discovered them, the Court will grant specific performance against him without compensation. That was done by Sir W. Grant in *Hall* v. *Smith* (1), which, though considered by Lord St. Leonards as an extreme case, is treated by him as an authority: see Vendors and Purchasers, vol. i. p. 11, 10th ed. If such rights are more important, or there are any circumstances which would make it a case of hardship on the purchaser to enforce the contract, the Court will hold its hand, and refuse specific performance, unless compensation is consented to by the vendors.

The cases cited in the argument of *Hughes* v. *Jones* (2), *Martin* v. *Cotter* (3), and *Caballero* v. *Henty* (4), are examples. In the last case particularly the true limits of the doctrine of constructive notice of a tenancy as between vendors and purchasers is very clearly laid down. But in no case of the kind that I am aware of has the Court enforced the contract against the vendor with indemity or compensation; and the case of *James* v. *Lichfield* (5) is a direct authority against it, and, although some dicta in that case are open to criticism, as carrying the doctrine of constructive notice of tenants' rights as between vendors and purchasers to an unreasonable extent, and were disapproved of on that account in

(1) 14 Ves. 433.
(2) 3 D. F. & J. 307.
(3) 3 J. & Lat. 496.
(4) Law Rep. 9 Ch. 447.
(5) Law Rep. 9 Eq. 51.

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Caballero v. *Henty* (1), I am not aware that the decision has ever been impugned.

In taking this course, the Courts no doubt have had regard to the injustice that would often be worked by enforcing compensation against vendors, who may, with perfect honesty, as in this case, have failed to disclose some particular, and who would rather take back the estate than submit to any reduction of the purchase-money.

It may well be thought that sufficient is done for the purchaser to satisfy justice if he has the option of escaping from the contract. If, as in this case, the purchaser elects to keep the estate, it is a fair inference that he is not dissatisfied with his bargain.

Another reason for not awarding compensation in a case like this is the difficulty of estimating the amount. As I have already pointed out, it would be unjust to take (as is proposed in this case) the difference of market price and fodder price of the produce actually left on the farm, because the tenant would naturally leave a much larger produce if he was to receive market price for it, than if he was to receive only fodder price.

The only fair way of estimating the compensation would be to charge the vendor with the difference on the average quantity that would be left by a tenant at fodder price, and that would be very difficult to ascertain. In addition to what I have said, I am also very much disposed to think that the ninth condition of sale, which declared that, if any error, misstatement, or omission in the particulars or the conditions should be discovered, the same should not annul the sale, nor should any compensation be allowed or given by the vendor or purchaser in respect thereof, would, of itself, be held to prevent any claim for compensation being successfully made, though it would not, of course, prevent the Court from refusing specific performance, as that would not amount to an annulling of the contract.

For these reasons, I am of opinion that the judgment of the Court below is right, and ought to be affirmed; but as I have the misfortune to differ from the rest of the Court, I need hardly say that I express this opinion with the greatest possible diffidence.

(1) Law Rep. 9 Ch. 447.

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POLLOCK, B. The facts of this case are so fully set forth in the judgment of the Court of Common Pleas, that it is unnecessary for me to recapitulate them.

It was contended for the plaintiff that the agreements dated the 11th of May, 1868, did not affect the tenancies which then existed between the defendants and their tenants, but were only a compromise by the landlords of a claim made by the tenants for leases whereby the tenants undertook to forego their claim, and deliver up possession on the 29th of September, 1869, in consideration of the landlords' allowing them the half-year's rent due September, 1868; paying to them 100*l.* on the 29th of September, 1868, and also allowing them at the determination of the tenancy market value instead of fodder value for all the hay, straw, and manure left on the farm.

For the defendants it was contended that the effect of these agreements was to create a new tenancy, and that, if so, the plaintiff, as vendee, when he purchased the estate, having notice of the existence of such tenancies, was bound to inquire into the nature of them, and having failed to do so, could establish no right of action against his vendors in respect of any liability which arose out of the terms of such tenancy; his rights being governed by the principle acted upon in the cases of *Taylor* v. *Stibbert* (1), *Hall* v. *Smith* (2), *Daniels* v. *Davison* (3), and *James* v. *Lichfield.* (4)

Mr. Channell, in arguing for the plaintiff, admitted that if the effect of the agreements was that for which the defendants contended, the legal consequence asserted by them would properly follow. It may be open to some doubt whether, having reference to the recent decision of the Lords Justices in *Caballero* v. *Henty* (5), this admission would not go too far; but it is unnecessary to consider this now, because, in my opinion, the view which was presented to us on behalf of the plaintiff of the agreements in question is the correct one.

In considering this question I will take the agreement with the tenant Parker, which, in substance, is the same as the others. At the date of this agreement there was a subsisting tenancy from

(1) 2 Ves. Jun. 437.
(2) 14 Ves. 433.
(3) 16 Ves. 253; 17 Ves. 433.
(4) Law Rep. 9 Ex. 51.
(5) Law Rep. 9 Ch. 447.

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year to year, and although that was created by parol, it was, when supplemented by the custom of the country, complete as to rent and all usual terms, including the payment by the landlord at the expiration of the tenancy for hay and straw at fodder value.

The agreement of the 11th of May is in writing, and, therefore, its construction is wholly for the Court, and, having carefully studied its language and object, the conclusion at which I have arrived is that it well expresses and carries out that which the parties doubtless intended, namely, to give the tenant who forewent his supposed right to demand a lease, a pecuniary benefit by remission of rent, by a payment of money, and by the landlord purchasing at the end of the term his hay, straw, &c., at a valuation more favourable to him than that which he would, under the terms of his tenancy, have received.

It contains no words of demise, no reservation of rent, or terms of holding, nor any language adapted to, or suggesting, the creation of a new tenancy, or the continuance of an existing tenancy, and nothing from which I can infer an intention to import into the written agreement any of the terms under which the tenant held; and where this is so, I cannot, contrary to the legal import, and contrary to what appears to be the object and intention of the parties, assume that an existing tenancy is terminated and a new one created.

It was truly said by Parke, B., in *Lyon* v. *Reed* (1), that in certain cases a surrender is not the result of intention, because there can be no question of intention; but the cases to which he refers are those in which acts have been done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. "The law there says that the act itself amounts to a surrender." In the present case I find not only that there is no such act, but that to presume such an act would be contrary to the intention of the parties.

It was strongly pressed upon us by Mr. Herschell, in arguing for the defendants, that unless the new terms contained in the agreement of the 11th of May were held to be a part of the tenancy,

(1) 13 M. & W. at p. 306.

they would not be binding upon anyone who should become landlord by death or assignment, and that the tenant could not bring an action against his new landlord for any breach of its terms. It seems to be clear, however, that even could we properly hold that the new terms were a part of the tenancy, no such action would lie. At common law, rent is an incident of the reversion, and a reversioner may sue for it as a debt; but contracts with a lessor relating to the mode of enjoyment or of quitting the premises demised, did not, before the statute of Henry VIII., pass with the reversion, but were merely personal contracts; and this is so still where there is no lease under seal, and in such a case the assignee of the reversion cannot sue the lessee upon the contracts contained in the lease between the lessee and the assignor. This was so decided in *Standen* v. *Chrismas* (1), and by parity of reasoning it was held in *Bickford* v. *Parsons* (2) that the lessor, where there is only a parol lease, by assigning his reversion does not lose any of his rights of action against his lessee.

There are cases in which a reversioner may become entitled to the benefit and liable to the obligation of terms identical with those which were contained in a parol lease with the original landlord; but to effect this there must be a new contract supported by its own consideration. Thus in *Buckworth* v. *Simpson* (3) it was held that where there is a tenancy from year to year, if the then new landlord and tenant allow the time for giving notice to quit to elapse without giving such notice, a new contract may be implied to the effect that the new landlord and tenant will adhere to the terms of the tenancy, and on this new contract either party may sue the other; but the necessity for this implication shews that there must be a new contract, and here there is none.

For the decision of this case, however, it is necessary to look at the facts in a broader and less technical manner, and to deal with it by considering what it was that the defendants undertook to convey to the plaintiff. The judgment of the Court of Common Pleas proceeds on the ground that the plaintiff was not entitled to have the farms conveyed free from any claim of the tenants to be paid on the termination of their tenancies at a higher rate than

(1) 10 Q. B. 135; 16 L. J. (Q.B.) 265. (2) 5 C. B. 920; 17 L. J. (C.P.) 192.
(3) 1 C. M. & R. 834.

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fodder value; there being, it is said, no words in the contract, nor facts found in the case, from which it can be gathered that such a condition is to be incorporated into the contract. To this proposition I cannot assent. Taking Parker's farm as an illustration, what is it that the defendants agreed to sell, and the plaintiff to buy, in respect of that farm? It was described as "a farm in the occupation of Mr. Parker till Michaelmas, 1869, at the low annual rent of 580*l*." The contract is dated the 18th July, 1868, and its subject matter was a farm which Mr. Parker was to occupy till Michaelmas, 1869, and by the 11th condition the plaintiff was to take the rents or possession at Michaelmas, 1868.

Conditions of sale are not necessarily nor indeed usually expressed in the technical language of conveyancers; the expression, "a farm in the occupation of Mr. Parker till Michaelmas, 1869," at a certain rent, appears to me clearly to mean that Mr. Parker was entitled to hold as tenant till that time, and at that rent, and that consequently the subject matter of the contract was the reversion subject to Mr. Parker's tenancy.

Had Mr. Parker held under an indenture of lease for a term to expire at Michaelmas, 1869, and the particulars of sale had so stated, and that the subject-matter of the sale was the reversion from Michaelmas, 1868, there can be no doubt that a vendee would be considered as purchasing all the rights of the reversion as from Michaelmas, 1868. If in such a case the lease should contain a covenant by the tenant to leave the fodder on being paid fodder value, the right to have the fodder so left would be one of the rights which the vendee contracted to purchase.

It is not necessary that the vendee should know the terms of the lease. By buying the reversion described as expectant on a particular ascertained lease, he contracts for the rights and liabilities which that lease attaches to the reversion. Possibly if the lease were to contain extraordinary or onerous covenants to be performed by the reversioner, they would, if not disclosed, entitle the vendee to some relief in equity, or to resist a bill filed for specific performance. No such question arises, however, in the present case, as the terms are the ordinary terms of an agricultural tenancy. With respect to the rights which the vendee of a reversion purchases, I see no difference between the case of a

reversion expectant on a term created by a lease under seal, and one created by parol. The vendee in either case purchases the reversion with the rights which the terms of the existing tenancy give to the landlord. One of these terms in the present case was that the tenant should leave the hay, &c., at fodder value for the benefit of the landlord.

Assuming the conclusion I have thus far arrived at to be correct, the next question which arises is, can the plaintiff recover from the defendants the amount paid by the plaintiff to the tenants at the expiration of their tenancies in September, 1869, as the market value of the hay, straw, and manure, which considerably exceeded the fodder value of the same?

It was argued that the plaintiff paid this in his own wrong, for that if it is conceded that the agreement of May, 1868, was personal only with the landlord, and did not affect the terms of the tenancy, any right acquired under it would be binding only on the original landlord, and not on the plaintiff as his vendee and assignee. It seems to me, however, unnecessary for the decision of this case to further consider this part of it, for it is clear that the plaintiff would be in great practical difficulty had the tenants insisted on carrying away their hay, &c., unless they were paid market value, and that this would be in derogation of the rights which as between vendor and vendee the latter was entitled to, and was a matter which ought therefore to have been disclosed, and failing this, the vendor ought in all fairness to make good any loss which the purchaser might sustain thereby. Hence a question arose between the solicitors of the plaintiff and defendants, and, after some correspondence, the agreement of the 6th of January, 1869, was drawn up and signed, whereby it was agreed that the plaintiff should settle the purchase without prejudice to the claim made by him for an indemnity. Further, in June, 1870, one of the tenants, Mr. Parker, having brought an action against the plaintiff to recover the market value of hay, &c., left by him on his farm, it was arranged that if the plaintiff paid the amount claimed and taxed costs, the defendants would regard it as if it had been recovered by verdict.

The result of all this, in my opinion, is that the plaintiff and defendants agreed in substance that the purchaser's rights were

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not to be in any way prejudiced by the completion of the purchase and the settlement of the action, and that if the defendants as vendors ought to bear the difference between fodder and market value, they would do so. Ought they, then, to bear this difference? The tenant's right to market value was a special and unusual right beyond what arose from the custom of the country, and therefore one which the vendee was not bound to know of; and that right being created by the vendor for his own benefit, he ought to have disclosed it, and not having done so, the result of the arrangement between the plaintiff and the defendants was, that the latter were to make good to the former any loss that might arise from the existence of that right.

For these reasons the plaintiff's cause of action is, in my opinion, well founded, and the judgment of the Court below ought to be reversed, and judgment entered for the plaintiff.

BLACKBURN, J., delivered the judgment of himself, MELLOR, J., and CLEASBY, B.:—

As this is a Court of error, and the decision will be binding till reversed by a higher Court, I wish to confine my judgment to the one point on which I think the Court below were wrong. At present I am not prepared to differ from the Court below on any other point, but it is not necessary, in the view I take of the case, to decide more than this one. I therefore desire, as far as my judgment goes, to leave the judgment below neither affirmed nor shaken by the decision of the Court in error, on any point but that one; and for the same reason I wish neither to express assent to, nor dissent from, the other points discussed by my Brothers POLLOCK and AMPHLETT, whose judgments I have perused and considered.

The point on which I differ from the Court below is as to the construction of the three agreements of the 11th of May, 1868, made between the vendors and the tenants of the property, afterwards sold to the plaintiff. Before the time for completing the purchase the plaintiff became aware of the existence of those agreements, and required security against any loss which he might sustain in consequence of their existence, if he completed the purchase. The result was an agreement set out in the 12th paragraph of the case.

I think this agreement amounts to a request from the vendors (the defendants) to the plaintiff, to pay to the tenants the market value instead of the fodder price, on the terms that he should be repaid by the defendants the difference between those two prices if the eminent queen's counsel to whom the question was to be referred should decide that the vendors, and not the purchaser, ought to pay that sum to the tenants.

The reference went off, and the Court therefore has to decide that question. If it is decided in favour of the plaintiff, he is entitled to a judgment in his favour for money paid to the defendants' use at their request, the amount of which must be determined by arbitration.

The reason why I think that the vendors ought to have paid that sum is that I construe the agreements of the 11th of May, 1868, as personal contracts between the tenants and (their then landlords) the defendants, binding the latter personally; not as leases binding the land or reversion, or affecting the rights or obligations of the tenants to the plaintiff, who subsequently purchased the reversion.

My reasons for this opinion are as follows:—

Before the service of the notices to quit in April, 1868, all three farms were held under the defendants, as devisees for sale, on tenancies from year to year, terminable by notice to quit, on the terms, amongst others, that at the termination of the tenancy the hay and straw should be left at fodder value.

On the service of the notices to quit, these tenancies became tenancies for a fixed period, terminating on the 29th of September, 1869.

The owners of the reversion and the tenants might, if they pleased, agree on fresh demises or (which would have the same effect) by mutual consent cancel the notices to quit; but unless both came to a fresh agreement of some sort, the existing tenancies would expire on that day.

It appears that the tenants alleged that the devisees' testator had promised them leases of their respective farms. There is nothing stated in the case that could make these alleged promises binding on the devisees, either at law or in equity, and we must therefore conclude that they were not binding; but, from the

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conduct of the parties, it appears that the devisees thought them binding in honour and justice, and accordingly they entered into the agreements of the 11th of May, 1868.

If those agreements amounted to fresh demises, the acceptance of them by the tenants would operate as a surrender by operation of law of the old tenancies and the creation of new tenancies, determining on the same day, viz., the 29th of September, 1869; in which case the land would be bound, and the now plaintiff, who in the interval became purchaser of the reversion, took it subject to those new tenancies. Perhaps in that case the purchaser of the reversion would not be bound to take the hay and straw at market value, but at least he would not be able to force the tenants to leave it at fodder value. But if the agreements were not fresh demises, but merely contracts binding the devisees personally, the old tenancies remained in force, and the rights and obligations of the tenants to them and the plaintiff, as purchaser of the reversion subject to the old tenancies, were not in any way affected or bound by the personal contract of the devisees from whom the plaintiff purchased.

This point was not overlooked in the Court below, for in the judgment it is said: "The arrangements with the tenants seem to us, upon the true view of them, not to be as to the question of market value, collateral agreements, nor unspecified claims and incumbrances, but really terms of the holdings of the tenants and incident to those holdings." The reasons for this opinion are not given. On the full consideration which I think I am bound to give before differing from the opinion of the Court of Common Pleas, I cannot agree in it.

I will, like my Brother Amphlett, take the agreement with Parker, the principal tenant, as a sample, and consider it.

The object and purpose of the parties was to give to the tenants compensation for the breach by the devisees of the honorary engagement of their testator, a personal act on the part of the devisees done by them with a view to a sale. Such an object would, most naturally, be carried out by giving compensation before the sale, or by binding themselves personally to pay compensation after the sale. It would be rather baffled by anything affecting the estate in the hands of the purchasers. There is one

promise to do three things, to remit the half year's rent due at September, 1868, to pay 100*l.*, and to allow market value for the fodder. As far as regards the remission of the half year's rent becoming due at September, 1868, and the payment of 100*l.*, the promise is clearly personal only, and does not affect the land. And it seems to me that primâ facie the promise, which is in part personal, is personal in the whole. If there was anything to indicate an intention to make it bind the land in part, I agree that the intention should prevail, but I do not see anything so to do.

The devisees had in contemplation a sale of the property; they had already prepared conditions of sale in which, of course, no notice was taken of the agreements of the 11th of May, not then yet made. And though it appears that the auctioneer verbally mentioned them at the time when the property was bought in, they afterwards sold under these conditions to a purchaser, who had at the time of his purchase no notice of those agreements. I am inclined to agree with the Court below, that if these agreements did constitute demises, the failure to give notice of them would not, in the absence of fraud, give the plaintiff any cause of action, and certainly I am not prepared to reverse their judgment to that effect; though, as I stated before, I prefer to leave it neither affirmed or reversed. But I think that the very object and wish of the devisees must have been that the agreements should be made so as not to affect the purchaser, and that the sale should go on just as if the agreements had never been made; though they themselves would give the tenants compensation for the breach by them of the tenants' claim to have a lease; a claim which they thought good in honour and conscience, though not enforceable. My Brother Amphlett says that, in the event of the devisees dying before the 29th of September, 1869, the construction for which I now argue would have made the tenants' claim for the difference between market and fodder value, as well as for the 100*l.*, be against their executors and not against the heir. I agree that if it does not bind the land this consequence follows; but I am far from thinking this a reductio ad absurdum. I think it was not wished to make it bind the land. My Brother Pollock has, in his judgment, well expressed the reasons for thinking that the

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words used in the agreement carry out the real intention and do not bind the land. This view of the agreement renders it unnecessary to consider the more technical question, to what extent the terms of a demise not under seal would affect a purchaser of the reversion. I do not mean to express any dissent from what my Brother Pollock says, but merely to say that I am unwilling unnecessarily to enter on that question in a court of error; and I think it unnecessary so to do as I think this agreement was not a demise, and, consequently, I think that the question intended to have been submitted to Sir R. Palmer ought to be decided in favour of the plaintiff.

The judgment, therefore, in my opinion, should be reversed; the amount (if the parties cannot agree on it) to be ascertained by a reference.

BRAMWELL, B., concurred with the judgments of Blackburn, J., and Pollock, B.

Judgment reversed.

Attorneys for plaintiff: *C. J. Allen & Son.*
Attorneys for defendant: *Ranken, Ford, & Co.*

April 23.

WESTENBERG *v.* MORTIMORE, EXECUTRIX, &c.

Security for Costs—Plaintiff a Foreigner, but occasionally residing in England.

Pending a reference, the plaintiff, a foreigner whose domicile was in Holland, but who for some years had occasionally resided at a furnished lodging in London, went abroad. During his absence from this country, the defendant obtained an order for security for costs:—

The Court refused to rescind the order, upon an affidavit that the plaintiff had returned to England, and intended to remain there until the final settlement of the action.

THIS was an action brought in May, 1872, to recover damages for an alleged breach of contract by the testator in selling certain goods consigned to him as factor below the limits fixed by the plaintiff, and for negligence. The matter was referred to Master Dodgson.

Pending the reference, viz. on the 6th of February last, the

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defendant took out a summons calling upon the plaintiff to shew cause why he should not give security for costs. This summons, which was supported by an affidavit that "the plaintiff is now residing in Holland, and out of the jurisdiction of this Court, and carries on the business of a glover at Amsterdam, and does not carry on any business in this country, and is domiciled in the kingdom of Holland," was heard before Master Dodgson on the 9th of February, when an order was made for security. On the 15th, an application was made to the master to rescind that order, founded upon an affidavit of the plaintiff in which he swore that he resided and had resided at 58, Leighton Road, Kentish Town, for more than eight years last past, and he intended to reside there until this action should have been completely settled; that, ever since the commencement of the action, he had been accustomed to go to Amsterdam, where his family reside, but had invariably returned to England in time for the next appointment on the reference; and that he would have returned as usual for the last appointment before the master, had not the rivers in Holland at that time been frozen over. The affidavit in answer to that application stated that it was true that the plaintiff resided at No. 58, Leighton Road, as stated in his affidavit, but he only occupied furnished apartments there at a low rent. The master having refused to rescind the order, the plaintiff appealed to Lush, J., who dismissed his summons.

Arbuthnot now moved for a rule calling upon the defendant to shew cause why the order of Master Dodgson should not be rescinded. In support of the motion, the plaintiff swore that he was in London actually residing at his above address when the summons was heard before Lush, J.; that he had been there ever since July or August, 1866, and was now actually residing there; that he had only left this country from time to time under the full belief that his rights in this action would not be thereby prejudiced; and that he had no intention to leave England until after the determination of the action. The rule is, that security for costs will not be required from a plaintiff, though domiciled abroad, if he be in England at the time of the application: *Dow-*

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ling v. *Harman* (1); *Tambisco* v. *Pacifico* (2); *Ciragno* v. *Hassan* (3); *Anonymous.* (4)

[LORD COLERIDGE, C.J. That rule was not adopted by the Court of Queen's Bench in *Oliva* v. *Johnson.* (5) There the plaintiff carried on business abroad, and had no permanent residence in England, but was in England at the time of bringing the action, and it was sworn had no intention of leaving the country: and it was held this was no sufficient answer to an application for security for costs, inasmuch as it was not distinctly sworn that he resided and intended to continue to reside here.

BRETT, J. In *Tambisco* v. *Pacifico* (2), the plaintiff was in this country at the time the application for security was made. Here he was not.]

In *Gurney* v. *Key* (6), which is the strongest case against the application, the plaintiff had not any domicile in this country, but was only here for certain temporary purposes. That, too, was a decision of a single judge, and took place prior to the case of *Tambisco* v. *Pacifico.* (2)

[BRETT, J. I think the plaintiff's own affidavit sufficiently shews that his real domicile is in Holland.

DENMAN, J., referred to *Frodsham* v. *Myers* (7), where it was held to be no ground for calling for security that the plaintiff had volunteered into the service of the Queen of Spain and was now residing in that country.]

It must be admitted that there is no case exactly in point.

LORD COLERIDGE, C.J. I am of opinion that this rule should be refused. It is admitted that the application is not strictly within any of the decided cases. The plaintiff is a foreigner domiciled in Holland, though it may be he has an occasional residence in this country. It appears that he came here for the purpose of prosecuting a reference before a master. He then went abroad; and, as he did not return, an order for security for costs was obtained by the defendant. There is no doubt the order was well made at the time. The plaintiff was a foreigner residing

(1) 6 M. & W. 131.
(2) 7 Ex. 816; 21 L. J. (Ex.) 276.
(3) 6 Taunt. 20.
(4) 8 Taunt. 737.
(5) 5 B. & Ald. 908.
(6) 3 Dowl. 559.
(7) 4 Dowl. 280.

abroad. Although he was occasionally here, yet when the order was applied for he was out of the country. Under these circumstances, it was the ordinary practice of the Court to require security for costs. The plaintiff having subsequently returned to this country, the master was asked to rescind his order. He refused to do so, and the plaintiff appealed from that order to my Brother Lush. My Brother Lush, who is a high authority upon the practice of the Courts, heard the matter and declined to interfere with the master's discretion. If it were a matter for our discretion, we should not be disposed to interfere with the learned judge's discretion, unless clearly satisfied that he had acted wrongly. But I conceive it to be perfectly clear that neither the master nor the learned judge was wrong in point of law. Having read the affidavits, I am satisfied that the master acted with perfect propriety.

BRETT, J. It appears from the affidavit upon which the order for security was made that the plaintiff's real place of residence was at that time Holland. That order is not objected to: and it seems to me to be clear that it was properly made. The present application seeks to get rid of that order upon an allegation that the plaintiff has now come to reside in this country. Such an application might be made even after security given. I doubt whether, even if satisfied of the bona fides of this application, the Court could rescind the order. Possibly the obligation might be got rid of upon terms. Upon the affidavits brought forward upon this occasion, a grave question might arise as to whether the coming back to reside here was bonâ fide. Some one would have to decide that. Here, the affidavits shew that the plaintiff was not in this country at the time the order was made, and therefore the order was properly made when it was made. Upon the whole, so far from thinking that the master was wrong, I am of opinion that he was quite right in declining to rescind it.

DENMAN, J. I am of the same opinion. If we were to interfere in this case, we should be taking upon ourselves to overrule the discretion of the master and of the judge, without any substantial reasons for so doing. The cases of *Dowling* v. *Harman* (1)

(1) 6 M. & W. 131.

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and *Tambisco* v. *Pacifico* (1) very much qualify the rule in *Oliva* v. *Johnson*. (2) But I do not think this case falls within either case.

Rule refused.

Attorneys for plaintiff: *Townley & Gard.*
Attorney for defendant: *Cleobury.*

April 29.

THE NEW RIVER COMPANY *v.* MATHER.

Water-rate, Assessment of, and how enforced—New River Company's Act, 1852, *s.* 46—*Railways Clauses Consolidation Act*, 1845, *ss.* 140, 142—*Waterworks Clauses Act*, 1847, *s.* 68.

Sect. 68 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), enacts that the water-rate shall be payable according to the "annual value" of the tenement supplied with water, and that, "if any dispute arise as to such value, the same shall be determined by two justices." This Act incorporates the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 140 and 142 of which give the mode of procedure before the justices.

By s. 46 of the New River Company's Act, 1852 (15 & 16 Vict. c. clx), which incorporates the Waterworks Clauses Act, 1847, it is enacted that "nothing in this Act or any Act incorporated herewith contained shall prevent the company from recovering any sum of money not exceeding 50*l.* which shall be due to them for water-rates or rents, or for damages, costs, or expenses, by action or proceeding in such manner as is by law provided for the recovery of debts not exceeding 50*l.*":—

Held, that, where a bonâ fide dispute arises as to the "annual value," the company must, before they can sue for the rate under s. 46 of the special Act, obtain a decision of justices on that dispute, under s. 68 of the general Act.

This was a plaint entered by the plaintiffs against the defendant in the Clerkenwell County Court to recover 16*s.*, being the balance of two years' water-rate due from the defendant to the plaintiffs at Christmas, 1873.

The plaintiffs are a company incorporated by Royal charter of James I. for supplying the metropolis with water, and have their head office in Clerkenwell. The defendant is lessee and occupier of No. 9, Hasting Street, Euston Road, St. Pancras, and within the company's limit of supply. It was admitted on the part of the plaintiffs that the claim of 16*s.* was a mistake, and that it should have been 13*s.* 2*d.*

(1) 7 Ex. 816; 21 L. J. (Ex.) 276. (2) 5 B. & Ald. 908.

Evidence was given on the part of the plaintiffs to shew that the rate was 4 per cent. upon the annual value of the house, which they contended was 22*l.* The following correspondence between the plaintiffs' officers and their attorneys and the defendant was also put in.

April 15th, 1873, defendant to the clerk of the company:—

"Sir,—Your collector has demanded 15*s.* of me for three quarters' water-rate for this house, to Lady-day last, accompanied by a threat that, if the amount be not paid on the 15th instant, the supply will be withdrawn without further notice. I beg to inform you that I object to such demand as excessive and illegal.

"The actual annual rent of the house paid by me as occupier is 20*l.*, and it is entered in the valuation list as 22*l.* The annual rateable value is entered in the valuation list at 18*l.* only, and I claim to have the water-rate calculated upon the basis of such annual rateable value: see 32 & 33 Vict. c. 67, s. 45. When, six years ago, I appealed to your directors against a rate of 18*s.* per annum, upon production of my lease they fixed the rate at 16*s.* per annum, being your maximum rate on the rental of 20*l.*, and, to avoid litigation, but without prejudice to any of my legal rights in this respect, I now tender you 12*s.*, being three-quarters rate at the rate fixed by the directors themselves.

"I will not again attend your directors' self-constituted court of appeal; but, if necessary, will proceed under the provisions of the Waterworks Clauses Act, 1847, incorporated with your Act of 1852, to have this point set at rest once for all."

On the 4th of July, 1873, the defendant tendered to the collector 4*s.* for a quarter's rate for the house, due on the 24th of June, being at the rate of 4 per cent. on a rental of 20*l.* per annum; which the collector refused to receive: and on the 16th of October, 1873, the defendant wrote to the clerk or secretary, as follows:—

"Sir,—In consequence of your collector's continued demand, and a notice he left here yesterday, I beg to refer you to the annexed copy of a notice and tender served on him in July last, and also to my letter to you dated the 15th of April, 1873.

"As explained when I had the pleasure of seeing you on the last-named day, I am and always have been willing to pay any and all demands which your company can legally make; but, as I con-

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sider that now made excessive and illegal; until under the provisions of the Waterworks Clauses Act, 1847, and of their special Act, your company shall have established their right to make it, I shall continue to resist payment.

"Without prejudice, however, and to avoid litigation, I again renew my offer to pay your company 16*s.* per annum for their water supply to this house, being at their maximum rate of 4 per cent. on my actual rental of 20*l.* At any time within a week from this date your collector can receive here, or I will send to him, if desired, 8*s.* in payment of two quarters' water-rate to Michaelmas last. After that period, you will consider this offer finally withdrawn, and both parties must thenceforth rest on their legal rights alone."

On the 3rd of November, 1873, the company's solicitors wrote to the defendant:—

"Sir,—You are in error in assuming that s. 45 of the 32 & 33 Vict. c. 67 regulates your water-rent; but, if you will refer to the 4th section of that Act, you will find that the term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament, if the tenant undertook to pay all usual tenants' rates and taxes, and tithe commutation rent-charge (if any), and if the landlord undertook to bear the costs of the repairs, insurance, and other expenses (if any) necessary to maintain the hereditament in a state to command that rent.

"We understand you have a lease of the premises, and assume that you are under covenant to keep them in repair; and that it is for this reason the assessment committee have put the gross value at 22*l.* instead of 20*l.*, the rent you pay. Having had similar cases to your own, in which we have recovered judgment in the county court, we are instructed to obtain payment of the 18*s.*, the amount now due, seeing that a principle is involved."

November 5th, 1873, defendant to the company's solicitors:—

"Gentlemen,—You will please distinctly to understand that I have no wish to evade the just demands of the New River Company; but I dispute the correctness of the annual value they have put on my house, and consequently the water-rate based upon it. Is a summons in the county court the statutory mode of settling

these differences? If so, pray proceed at once. I quite agree with you that the difference between the company and myself involves a question of principle, or the want of it; at all events, in my case the proceedings of their officers have been very vexatious.

"My tenancy of this house commenced at Christmas, 1862, under a three years' agreement, at a rental of 20*l.*, and is now under a lease for twenty-one years at the same rent. In the year 1867 I sent these documents to the secretary of the company for his perusal; and he had them in his possession some days. During these eleven years, however, the company have charged me with the following several and distinct water-rates, and in the order named, viz. 18*s.*, 16*s.*, and 20*s.*, and now again 18*s.* per annum. Can you tell me upon what principle the several assessments have been made, and in particular how the 18*s.* you claim of me is now made up?

"I certainly hold under what is generally called a repairing lease; but my lessors pay the insurance, and they allowed me two years' rent towards the repairs of the term. In fact, the lease was merely the form of an arrangement by which the lessors, who are trustees, relieved themselves of the trouble of seeing to the repairs personally."

7. The company having issued a plaint from the Clerkenwell county court claiming 7*s.* as the balance due for the half-year's rate of 9*s.* to Midsummer, 1874, based upon the gross annual value of 22*l.*, the defendant paid into court 6*s.* 10*d.*, as the balance due upon an annual value of 18*l.*, accompanying such payment with a notice addressed to the registrar, that "the question in dispute in this case is not the amount of water-rate due to the company, but what is the true basis of annual value on which such rate should be calculated."

8. The question in dispute between the parties was, the basis or "annual value" upon which the plaintiffs were entitled to charge the defendant's water-rate, and the tribunal to which the dispute should be submitted to determine the annual value of the premises.

9. The plaintiffs cited s. 35 of the New River Company's Act, 1852 (15 & 16 Vict. c. clx), which entitles them to charge at a rate

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per cent. per annum, where the "annual value" of the dwelling-house does not exceed 200*l.*, not exceeding 4*l.*

10. By s. 3, the Waterworks Clauses Act, 1847 (10 Vict. c. 17), is incorporated with the New River Company's Act, 1852.

11. It was admitted that the defendant's statement was correct, that the rateable value of the house inserted in the valuation list was 18*l.*, and the gross annual value stated therein 22*l.*; that the rent paid by him was 20*l.* per annum; that he had been allowed by his lessors two years' rent towards the repairs of the premises; and that no demand had been made for land-tax or tithe commutation rent-charge.

12. The defendant produced his lease, which bore out the statement in his letter of November 5th, 1873.

13. For the plaintiffs it was contended that the words "annual value" meant the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament, the tenant undertaking to pay all usual tenant's rates and taxes and the tithe commutation rent-charge (if any), and the landlord undertaking to bear the costs of repairs and insurance and other expenses (if any) necessary to maintain the premises in a state to command that rent; and, there being no interpretation clause as to "annual value" in the Waterworks Clauses Act, 1847, or in the New River Company's Act, 1852, they referred to s. 4 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), in support of their construction of those words. They further contended that the terms of the defendant's tenancy of the premises justified a valuation of 22*l.* per annum; that s. 46 of their special Act (1) enabled the company to sue in the county court, but that the county court judge had no jurisdiction to inquire into the annual value; and that, if the defendant disputed their valuation, he should have taken steps to have that question determined by two justices under s. 68 of the Waterworks Clauses Act, 1847, and could not raise it in the county court.

14. For the defendant it was contended: 1. That, assuming

(1) Which enacts that "nothing in this Act or any Act incorporated herewith contained shall prevent the company from recovering any sum of money not exceeding 50*l.* which shall be due to them for water-rates or rents, or for damages, costs, or expenses, by action or proceeding in such manner as is by law provided for the recovery of debts not exceeding 50*l.*

annual value of premises within the metropolis, for the purpose of a water-rate, when in dispute, to be determinable in accordance with the provisions of the Waterworks Clauses Act, 1847, the letters of the 15th of April, 1873, 16th of October, and 5th of November, and the tender of the 4th of July, sufficiently raised the question of annual value, and that the onus was on the plaintiffs to take proceedings under s. 68 of that Act to have such annual value determined; that, having failed to do so, and the annual value being admittedly in dispute, there was not any basis on which the plaintiffs could legally calculate a water-rate, and therefore there was not any water-rate for which the plaintiffs could sue; and that no evidence other than the decision of the statutory tribunal could be received in the county court. 2. That rent, though an element in the computation of "annual value," was not conclusive, but that the annual value must be ascertained by some fixed standard and independently of whether the premises be let or be occupied by the owner, or whether they be let furnished or unfurnished, or upon some particular arrangement between landlord and tenant; and that, in this respect, the compulsory water-rate stands upon the same footing as the poor or any other rate. 3. That, under the provisions of the Waterworks Clauses Act, 1847, and of the New River Company's Act, 1852, the water-rate is a rate within the meaning and operation of s. 45 of the Valuation (Metropolis) Act, 1869, which makes the valuation list for the time being in force conclusive as to the annual value of every (other) rate, assessment, and contribution levied, made, and required in the metropolis on the basis of value, and therefore the water-rate must be calculated on the basis of the annual rateable value of the premises appearing in the valuation list. 4. That the Valuation (Metropolis) Act, 1869, being a general Act on the subject of rating applicable to the premises in question, and subsequent to the Waterworks Clauses Act, 1847, and the New River Company's Act, 1852, by s. 77 repealed so much of the two last-mentioned Acts as authorizes any valuation of hereditaments to be made for the purpose of any rate or tax in respect of which the valuation list is by that Act made conclusive. The *Sheffield Waterworks Co.* v. *Bennett* (1) was cited in support of the defendant's contention.

(1) Law Rep. 7 Ex. 409.

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The judge held that it was competent to him under s. 46 of the New River Company's Act, 1852, to entertain the question, and that the Valuation (Metropolis) Act, 1869, did not apply to water-rate; that rateable value was not the test, but only that which the tenant paid to his landlord under ordinary circumstances, and that there was nothing to take this case out of the ordinary circumstances; and he gave judgment for the plaintiffs "for payment of the water-rate upon the sum of 20*l.*, being the amount paid by the defendant to his landlord for rent, and thus leaving a balance of 3*s.* 2*d.* due from the defendant to the plaintiffs over and above the 6*s.* 10*d.* paid into court."

The questions stated for the opinion of the Court were,—

1. Whether the plaintiffs are, under the circumstances and under the Acts referred to, entitled to charge the defendant a water-rate upon the sum of 22*l.*, and not upon the sum of 18*l.*

2. Whether the judge was right in holding that the water-rate must be charged upon the actual sum paid as rent.

3. Whether the judge had power under s. 46 of the special Act to inquire into and determine the annual value.

4. Whether the judge was not bound, upon proof of the rate and assessment, to find for the plaintiffs for the amount claimed, inasmuch as the defendant had neglected to apply to two justices to determine the annual value of his tenement, pursuant to s. 68 of 10 Vict. c. 17.

If the Court should answer the first and fourth questions in the affirmative, and the second and third in the negative, the judgment was to be set aside, and a new trial ordered, with costs, including the costs of and incident to this appeal.

Philbrick, Q.C., for the plaintiffs. This appeal raises the important question as to how the water-rate is to be assessed,—a question which more or less affects every waterworks company in the kingdom. The words "annual value" in the special Act mean, it is submitted, the annual rent which a tenant might reasonably be expected to pay for the premises, he paying rates and taxes, and the landlord undertaking to repair so as to maintain the premises in a state to command that rent.

[LORD COLERIDGE, C.J. The first question is whether the magistrates should not first have decided upon the value.]

Assuming that the magistrates are the proper forum for settling disputes as to the value, it is for the party dissatisfied with the rate to put them in motion. The 68th section of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), enacts that "the water-rate, except as hereinafter and in the special Act mentioned, shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable (i.e. shall be calculated) according to the annual value of the tenement supplied with water; and, if any dispute arise as to such value, the same shall be determined by two justices." The mode of recovering the rate is pointed out by ss. 74 and 85 of the Waterworks Clauses Act, 1847. (1) The 46th section of the special Act enables the company to sue in the county court: it provides that "nothing in this Act or in any Act incorporated herewith shall prevent the company from recovering any sum of money not exceeding 50*l*., which shall be due to them for water-rates or rent, or for damages, costs, or expenses, by action or proceeding in such manner as is by law provided for the recovery of debts not exceeding 50*l*." The remedy for non-payment of the rate pointed out by the Act of 1847 may be cumulative. The consumer, having notice of the charge, if he disputes its propriety, is bound to go before

(1) Sect. 74 enacts that, "if any person supplied with water by the undertakers, or liable as herein or in the special Act provided to pay water-rate, neglects to pay any such water-rate at any of the said times of payment thereof, the undertakers may stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit, and may recover the rate due from such person, if less than 20*l*., with expenses of cutting off the water and costs of recovering the rate, in the same manner as any damages for the recovery of which no special provision is made are recoverable by this or the special Act; or, if the rate so due amount to 20*l*. or upwards, the undertakers may recover the same, with the expenses of cutting off the water, by action in any Court of competent jurisdiction."

And s. 85 enacts that, "if the waterworks shall be in England, the clauses of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, shall be incorporated with this and the special Act, and such clauses shall apply to the waterworks, and to the undertakings respectively, and shall be construed as if the word 'undertakers' had been inserted therein, instead of the word 'company.'" This refers to ss. 140 and 142 of the Railways Clauses Consolidation Act, 1845.

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the justices to settle the value. The object was, to give the company a summary and inexpensive remedy. As to the mode of assessing the value, *Sheffield Waterworks Co.* v. *Bennet* (1) was cited.

J. Brown, Q.C. (*S. Wills* with him), contrà. The party who makes the demand is the party whose duty it is to initiate the proceedings before the magistrates: *Ex parte Payne* (2); *St. Pancras* (*Vestry*) v. *Batterbury.* (3)

[BRETT, J. In the last-cited case the Act created the right and gave the remedy. Here, it did not require a statutory provision to enable the company to sue.]

At all events, the power to sue does not exist until the amount to be recovered has been first ascertained: *Scott* v. *Avery.* (4) Here, the amount of the rent not having been ascertained by the proper tribunal, the company were not in a condition to sue for it. There is nothing due until the amount has been determined: *Braunstein* v. *Accidental Death Insurance Co.* (5)

Philbrick, Q.C., in reply. No doubt, parties may agree among themselves that the amount the one shall be entitled to recover from the other shall be ascertained in a particular way. But that does not arise here. The only question is, whether there must be a decision of two justices before the company can sue for the water supply. At all events, it lies on the party who contests the amount to take steps to moderate it.

LORD COLERIDGE, C.J. I am of opinion that the judgment in this case should be reversed, and a nonsuit entered. One point only has been argued before us. I give no opinion upon another which was suggested. I base my judgment entirely on the second point, viz. that, upon the true construction of the 68th section of the Waterworks Clauses Act, 1847, the judge of the county court had no right to entertain the question.

This is a proceeding by the New River Company to recover the amount of a rate assessed upon the defendant. The company rated the defendant upon an annual value of 22*l.* The defendant

(1) Law Rep. 7 Ex. 409.
(2) 5 D. & L. 679.
(3) 2 C. B. (N.S.) 477; 26 L. J. (C.P.) 243.
(4) 6 H. L. C. 811; 25 L. J. (Ex.) 308.
(5) 1 B. & S. 782; 31 L. J. (Q.B.) 17.

disputed the assessment, and asserted that the true annual value of the premises was 18*l.* only, and he on the 15th of April, 1873, wrote to the secretary of the company claiming to be assessed upon that basis, tendering the sum which he said was due according to his view. The company declined to adopt the defendant's valuation or to accept the sum he tendered, and brought their action in the county court to recover what they deemed to be the proper amount of rate. The question is whether the county court was the proper tribunal to try this matter. By ss. 2 and 3 of the New River Company's Act, 1852, the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847 (with certain exceptions), are incorporated with the special Act. Now, s. 68 of the last-mentioned Act enacts that "the water-rate, except as hereinafter and in the special Act mentioned, shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water; and, if any dispute arise as to such value, the same shall be determined by two justices." In the present case, it is plain that a bonâ fide dispute as to the annual value of the tenement had arisen before the issuing of the plaint. It seems to follow that, before the company can enforce the payment of a rate as to which there is a dispute, and the amount of which depends upon the determination of that dispute, they must cause it to be determined in the way pointed out by that section, viz. by two justices, or by that tribunal which in the metropolitan district is substituted for two justices. All I desire to decide is, that, where there is a bonâ fide dispute as to the annual value of the tenement to be charged with the water-rate, properly raised and known to both parties, that dispute must be determined by the justices before payment of the rate can be enforced by action. That is the effect of s. 68 of the Waterworks Clauses Act, 1847. See how the thing works out. The 85th section of that Act (which is incorporated with the New River Company's Act, 1852), enacts that "if the waterworks shall be in England, the clauses of the Railways Clauses Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any *other matter* referred to justices, shall be incorporated with this and the special Act, and such clauses shall

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apply to the waterworks and to the undertakings respectively, and shall be construed as if the word 'undertakers' had been inserted therein instead of the word 'company.'" Sect. 142 of the Railways Clauses Consolidation Act, 1845, gives a mode of procedure: it enacts that, "where in this or the special Act any question of compensation, expenses, charges, or damages, or *other matter*, is referred to the determination of any one justice or more, it shall be lawful for any justice, upon the application of either party, to summon the other party to appear before one justice, or before two justices, as the case may require, at a time and place to be named in such summons; and, upon the appearance of such parties, or, in the absence of any of them, upon proof of due service of the summons, it shall be lawful for such one justice, or such two justices, as the case may be, to hear and determine such question, and for that purpose to examine such parties, or any of them, and their witnesses on oath; and the cost of every such inquiry shall be in the discretion of such justices, and they shall determine the amount thereof." Here the company are seeking to enforce payment of a rate. A dispute arises as to the annual value upon which the rate is to be calculated. Before they can proceed, they must get the matter so in dispute settled in the way pointed out by the Waterworks Clauses Act, 1847, and the Railways Clauses Consolidation Act, 1845; and, having done that, they may proceed to enforce payment, according to the value, by action in a superior Court or in the county court, whichever is the proper tribunal. It is not a question of exclusive jurisdiction of justices, in one sense. They cannot issue any order upon the summons before them; they are merely to determine the question of annual value. That seems to me to be reasonable and convenient, and at all events it is so enacted. We must therefore give judgment for the defendant.

BRETT, J. The matter is one of considerable difficulty: but, in the result, I concur so far as the present case is concerned that our judgment should be for the defendant. The facts are as follows:— The company had supplied water to a house of the defendant whose annual rent was 20*l.* After having supplied it for some time, they put the annual value of the house at 22*l.*, and claim to

be paid a rate at 4 per cent. upon that amount. The defendant, the tenant, disputed the propriety of the charge, on the ground that the company had calculated the rate improperly. The company brought their action in the county court to recover the amount they claimed, and the defendant tendered and paid into court the sum which he considered to be due: and he gave notice to the county court judge that the question in dispute was what was the true basis for determining the "annual value" of the premises. The county court judge proceeded to hear and determine the question, and he did determine the annual value of the tenement; and that is the only question which he really did decide. That raises the question whether, where there is a bonâ fide dispute as to the annual value, and that is brought to the notice of the county court judge, it is competent to him to entertain it.

These waterworks companies do not assess the annual value of premises in the same way as assessments for the poor-rates are made. They do not give notice of the assessment, so as to give the parties assessed an opportunity to appeal. They are incorporated with certain powers and obligations, and are entitled to charge for the goods (water) which they supply, sometimes by special agreement and sometimes by a percentage on the annual value. They do not make their charge until the water has been supplied. If they have rightly assessed the value, the money is due. The only question is, how the money is to be recovered, or, if disputes arise, before what tribunal they are to be determined. If the only thing to be inquired into is, whether the water has been supplied, and what amount is due, that may very well be decided by the county court; but the question is whether, where the matter in dispute is the basis of the valuation, the county court and the superior court are not both excluded from entertaining the matter. It is said, and properly said, that, by reason of the special Act having incorporated with it the Waterworks Clauses Act, 1847, it is to be construed as if s. 68 of that Act was part of it; and that section enacts that the water-rate shall be payable according to the annual value of the tenement supplied with water, and that, "if any dispute arise as to such value, the same shall be determined by two justices." The question we have to determine is, where a dispute as to the annual value has arisen before any

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proceeding taken to enforce the rate, can the company take the decision of that dispute from the magistrates, and call upon the county court or the superior court to determine it? Consistently with the cases cited, I come to the conclusion that the only tribunal which can under such circumstances determine the matter is the tribnnal pointed out by s. 68.

We have been referred to s. 85. That section, as to the form of procedure, incorporates s. 142 of the Railways Clauses Consolidation Act, 1845; and it seems to me that, if a dispute arises before action, one of the parties to the dispute must take out a summons before two magistrates, under s. 142, stating that there is a dispute as to the annual value, and claiming a decision on that point. All the magistrates can do is to give their decision. After such decision, the company may enforce their rights according to circumstances. They may cut off the supply, under s. 74 of the Waterworks Clauses Act, 1847, or may sue in the county court, or in the superior Court, under s. 46 of their special Act, according to the amount.

Now, let us consider what would be the state of things if the dispute arose after action brought. Must the Court in that case at once hold its hand? I decline to go so far. I entertain grave doubts whether the jurisdiction of the Court can be ousted, where the issue was properly raised before them at the time. I confine my judgment to the case before us, of a bonâ fide dispute arising before the commencement of the proceeding; and I am of opinion that, where notice is given in the county court, or in the superior Court by plea (I do not say it must necessarily be by plea, though I am inclined to think it must), that such a dispute has arisen, the Court cannot decide the question of annual value, but that that can only be decided by two justices. I therefore think the county court judge here decided that which was in the exclusive jurisdiction of another tribunal, and that therefore his decision must be reversed.

DENMAN, J. I am of the same opinion. I found my judgment upon the point which has been argued before us, viz. that, upon the facts of this case, it appears that a dispute as to the annual value of the tenement had so arisen as to make it incumbent on the company, before suing for the rate, to get the decision of two

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justices, and that they have not done so. I am of opinion that the county court judge had no authority to decide that dispute, as he has assumed to do.

HUDDLESTON, J. I am of the same opinion. This case turns upon the third question put by the county court judge, viz. whether he had power under s. 46 of the special Act to inquire into and determine the annual value. Upon the facts stated in this case, I am of opinion that he had no such jurisdiction. A water-rate was demanded of the defendant; the defendant objected that it was excessive and illegal, and on the 15th of April, 1873, he wrote to the company insisting that their valuation of his premises was too high, and claiming to have the matter settled under the Waterworks Clauses Act, 1847. Referring to s. 68 of that Act, I find it enacted that the water-rate shall be payable according to the annual value of the tenement supplied with water, and that, "if any dispute arise as to such value, the same shall be determined by two justices." The question is, who is to take action to obtain such decision? Mr. Philbrick contends that it is for the company in the first instance to fix the annual value, and that, if the tenant or owner of the premises disputes that valuation, he must go before the justices to have the matter decided. I do not agree with him. The company make a rate, and they wish to enforce it. Two courses are open to them; they may cut off the supply, or they may sue. But, before they can adopt the latter course, where notice is given that the annual value of the tenement is disputed, they must go before two justices to get that value ascertained in the way pointed out in s. 68 of the Waterworks Clauses Act, 1847, and s. 142 of the Railways Clauses Consolidation Act, 1845. Not having done that, it was not competent to the company to resort to the county court. The judge of that court had no power under s. 46 of the special Act to entertain the matter. His judgment must, therefore, be reversed, and a nonsuit entered. The costs will follow.

Judgment reversed.

Attorney for plaintiffs: *James Popham, for Thompson & Debenham.*

Attorney for defendant: *Greatorex.*

1875
May 5.

LLEWELLYN, Executrix, &c., *v.* RUTHERFORD.

Construction of Proviso in Lease of a Public-house—"Goodwill."

In August, 1845, the defendant's testatrix granted to the plaintiff a lease of a public-house in London Road, Liverpool, for fourteen years, at a rent of 70*l.* per annum, the latter paying 300*l.* for the goodwill; and, before the expiration of that lease, viz. in March, 1858, she granted him a further lease for fourteen years at a rent of 80*l.* per annum. Each of these leases contained the following proviso:—"Provided also, and it is agreed and declared that, at the expiration or other sooner determination of the term hereby granted, all such sum and sums of money as shall or can be procured for the goodwill of the business of a licensed victualler in respect of the premises from an incoming tenant, shall be received by and belong to the lessee, his executors, &c."

The second lease being about to expire, negotiations took place between the plaintiff and the defendant for a renewal, but they failed to come to terms; and the defendant, with notice of the plaintiff's claim under the above proviso, granted a lease of the premises to a new tenant for a term of fourteen years, at a rent of 160*l.* per annum, and a premium of 1300*l.*

Upon a case stated for the opinion of the Court by an arbitrator, to whom it was to be referred to assess the amount of damages the plaintiff was entitled to recover for the breach (if any) of the above proviso, upon the principles to be laid down by the Court, it was found as a fact that "the rental of 160*l.* per annum reserved in the lease granted to the new tenant was, without any premium, bonus, or other payment whatever, a full and sufficient rental for the premises under such a lease, whether intended for a licensed victualler's business or not;" and, further, that "the goodwill of the business carried on by the plaintiff would, if belonging to the owner of the house, have had a very considerable value, and, if such owner had in that case been willing to grant a lease similar to that granted to the new tenant, a sum exceeding 1300*l.* would without difficulty have been obtained for the goodwill":—

Held, that the proviso was broken; and that the arbitrator was to estimate the damages the plaintiff was entitled to recover for such breach, in the same manner as one accustomed to value "goodwill" as between outgoing and incoming tenant would estimate them, and in so doing was not to disregard the increased value of the property in the neighbourhood generally.

This action was brought to recover 1307*l.* 9*s.* 6*d.*, under the circumstances disclosed in the following case, which was stated by an arbitrator, who was (if necessary) to assess the damages on the principle which might be laid down by the Court.

1. The plaintiff is an hotel keeper, carrying on business at the White Bear Hotel, Dale Street, Liverpool. The defendant is the executrix and residuary legatee and devisee of Pyarea Brocklebank, late of Liverpool, widow.

2. Mrs. Brocklebank in her life-time was the owner of premises No. 90, London Road, Liverpool, being a corner house, which she in 1845 occupied and used as a licensed public house and spirit vaults.

3. In the latter end of July, 1845, the plaintiff (who was then carrying on the business of a publican in Great Howard Street, Liverpool) negotiated with Mrs. Brocklebank for a lease of her premises, and on the 21st of August, 1845, Mrs. Brocklebank granted a lease thereof to the plaintiff for a term of fourteen years from the date thereof, at the yearly rent of 70*l.*

4. On the granting of this lease Mrs. Brocklebank altogether retired from business, and the plaintiff paid Mrs. Brocklebank 300*l.* for the goodwill of the public-house in London Road, for which she gave him a receipt dated the 21st of August.

5. The lease contained the following proviso:—"Provided also, and it is hereby lastly agreed and declared, that, at the expiration or other sooner determination of the said term hereby created, all such sum and sums of money as shall or can be procured for the goodwill of the business of a licensed victualler in respect of the said premises from an incoming tenant, shall be received by and belong to the said William Llewellyn, his executors, administrators, or assigns."

6. The plaintiff entered into possession of the premises under the above lease, and the licences in respect of the business were transferred to him in the usual way; but, after being in possession for about a month, finding that the gross takings did not average more than 16*l.* a week (which was less than he expected), he, with the sanction of Mrs. Brocklebank, laid out on the premises upwards of 500*l.*

7. After this the business gradually improved, and by attention and industry the plaintiff increased the gross earnings to upwards of 40*l.* a week by the expiration of his lease.

8. In the beginning of 1858, the plaintiff negotiated with Mrs. Brocklebank for a renewed lease of the premises; and on the 1st of March, 1858, she granted to him a further lease for a term of fourteen years from the 21st of August, 1859, at the yearly rent of 80*l.* This lease contained a proviso identical with that set out in paragraph 5.

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9. Mrs. Brocklebank died on the 28th of May, 1859, having by her will (which was duly proved) appointed the defendant executrix, and having devised and bequeathed to her all her real and personal estate.

10. The plaintiff continued to occupy the premises, and during his occupation the business continued to increase, the average gross weekly takings during the year, from August, 1870, to August, 1871, amounting to 54*l.*; from August, 1871, to August, 1872, to 56*l.*; and from August, 1872, to August, 1873, to 67*l.*

11. On the 15th of February, 1873, the defendant wrote to the plaintiff the following letter:—

Dear Sir,—You are doubtless aware that the lease of the premises in London Road will expire on the 21st of August, 1873. Do you wish to renew the lease? I have not offered it to any one; nor do I intend to move in the matter till I have received your answer, being so old a tenant; but, of course, the new lease will be on very different terms from the old one. I shall be obliged by an early reply.

12. The plaintiff, being desirous of renewing his lease, had two interviews with the defendant on the subject, but no arrangement was come to; and on the 24th of February the defendant wrote to the plaintiff the following letter:—

Dear Sir,—My decision respecting your offer for renewing the lease in my property remains unchanged. I have determined (since our last interview) to hand over all my business affairs to my brother, as the most suitable and proper person to manage for me; and I shall invest him with due authority to act as my agent. I shall see no one; consequently, in future, all communications either by letter or otherwise must be made to Mr. C. G. Rutherford, &c.

13. The plaintiff thereupon instructed Mr. G. Prescott, of Liverpool, distiller, to act for him; and a correspondence passed between Mr. Prescott and Mr. Rutherford, of which the following is the substance:—

Feb. 27, 1873, Prescott to C. G. Rutherford,—

Since our conversation yesterday with regard to the premises 90, London Road, I have seen Mr. Llewellyn, and he desires me to say that, as you will not take less than 160*l.* per annum for the public-house, he will be obliged to give it. Of course you will give him a lease for fourteen years on the same conditions as the lease dated the 1st of March, 1858, the new lease to commence from the expiration of the present one.

March 26th, 1873, C. G. Rutherford to Prescott,—

Dear Sir,—Mr. Llewellyn can have a new lease of the house in London Road for seven years, at a rent of 160*l.* per annum, and bonus, which I am well advised is fair, of 1000*l.* to be inserted in the lease, which is to be in due and legal form with all its provisions, and to be completed within a month. The clauses relating

to painting, repairs, &c., to be assimilated to the lease expiring on the 21st of August next.

April 21st, 1873, Prescott to C. G. Rutherford,—

Dear Sir,—In reply to your letter of the 26th of March last, I have to inform you that Mr. Llewellyn agrees to take a new lease of the public-house in London Road for seven years from the expiration of the present term, at a rent of 160*l.* a year: the lease to contain similar provisions to the present one. As to the bonus mentioned in your letter, that, according to the conditions in the old lease, belongs to Mr. Llewellyn.

April 22nd, 1873, C. G. Rutherford to Prescott,—

Dear Sir,—I cannot confirm your letter of the 21st instant, as it does not agree to the conditions laid down in my letter of the 26th of March. The terms I offered were, 160*l.* per annum, and a bonus of 1000*l.* This bonus is simply a premium for granting a new lease. If there were to be no bonus, the rent would be correspondingly higher. In case you do not accept my offer of the 26th of March last by the evening of the 26th instant, I shall consider myself at liberty to treat with other parties.

April 26th, 1873, Prescott to C. G. Rutherford,—

In reply to your letter of the 22nd instant, I on behalf of Mr. Llewellyn agree to take the house on the terms mentioned in your letter of the 26th of March last. I repeat that the bonus (which is another word for goodwill) will belong to Mr. Llewellyn as the incoming tenant.

April 29th, 1873, C. G. Rutherford to Prescott,—

Dear Sir,—As your letter does not accept the terms I offer Mr. Llewellyn, I shall proceed to let the house to another tenant.

14. On the 21st of May an interview took place between Mr. Prescott and Mr. Rutherford, at which the latter made an offer which is referred to and repeated in his letter (hereinafter set out) of the 4th of June. On the 26th of May the plaintiff agreed for a lease of the White Bear Hotel, in Dale Street, for twenty-one years from that date. The White Bear is distant from No. 90, London Road, about ninety-five yards.

15. The following further correspondence took place:—

June 4th, 1873, C. G. Rutherford to Prescott,—

Dear Sir,—I must ask you to let me have a positive and distinct answer Yes or No to my offer of the 21st ult. in the course of the present week; and, in order that there may be no misunderstanding, I now repeat that offer in writing, and shall expect your reply in the same form. A lease for 10 years at a rent of 160*l.* per annum, and 1000*l.* to be paid on signing the lease. I beg to call your special attention to the extension of the lease from 7 to 10 years, without any addition to the 1000*l.* originally demanded. You can easily make the calculations of its money value for yourself. I put it down at 600*l.* at the very least, and consider it a most generous and liberal concession.

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June 4th, 1874, Prescott to C. G. Rutherford,—

Dear Sir,—In reply to your favour of this date, I beg to say that, on account of Mr. Llewellyn, I will take the public-house, London Road, for the term of ten years, as you now offer, at 160*l.* per annum. The 1000*l.* goodwill I claim according to the terms of the present lease. There will be now no difficulty in assessing the value of the goodwill; for, according to your own shewing, it is worth 1000*l.*, and for that amount, should you let it to another tenant, we shall take steps to recover.

June 5th, 1873, C. G. Rutherford to Prescott,—

Dear Sir,—It is useless our carrying this negotiation any further. My sister will proceed to let the house to another tenant; and Mr. Llewellyn may rest satisfied that no breach will be committed of the covenants contained in the lease entered into by Mrs. Brocklebank. Mr. Llewellyn must, therefore, be prepared to deliver up possession on the 21st of August next, the date of the termination of the lease; and, if he does not do so, legal proceedings will be taken to recover possession, &c.

16. On the 14th of June, 1874, the defendant gave the plaintiff the following notice in writing:—

I hereby give you notice that, unless you quit and deliver up to me the possession of the house and premises, situate, &c., which you now hold of me, on the 21st of August next, being the date of the expiration of your lease, I shall hold you liable for the payment to me of double the yearly value of the said house and premises. And I further give you notice that I estimate the yearly value of the said house and premises when let to a tenant at rack-rent at 300*l.* per annum.

17. The defendant then opened negotiations with one Barker for granting him a lease of the premises in question.

18. Between the 24th and 27th of June, an interview took place between C. G. Rutherford and Barker, at which the former offered to let No. 90, London Road to the latter for fourteen years at a rent of 295*l.* Mr. Barker objected to the high rent, and said he should prefer to take the house at 160*l.* a year for the term, and pay a sum down. At this interview Rutherford spoke of the goodwill in language similar to that contained in his letter of the 27th of June (hereinafter set out), saying that he had nothing to do with the goodwill, which belonged to Llewellyn. Rutherford did not, at this interview or at any other part of the negotiations with Barker, suggest that the latter should make any application to the plaintiff, nor did he at any time take any steps to enable the plaintiff, to dispose of the goodwill of the business: but the plaintiff and Barker were acquainted with each other, and the plaintiff knew that Barker was negotiating with Rutherford. There was

no evidence that the plaintiff made any effort to sell any part of his custom to Barker.

19. On the 27th of June, C. G. Rutherford wrote to Barker, as follows,—

> Dear Sir,—In making you an offer to grant you a lease of the house No. 90, London Road, of which Mr. Llewellyn is the present tenant, you must clearly understand that the rent and premium to be paid by you to Miss Rutherford have nothing whatever to do with the fixtures or the goodwill of Mr. Llewellyn's business. The goodwill of Mr. Llewellyn's business belongs to him, and he will necessarily take it with him. Therefore, you will clearly understand that you will not be able to use Mr. Llewellyn's name in any way.

20. On the 28th of June, an arrangement was come to between the defendant and Barker to lease the house to the latter for a term of fourteen years, at the yearly rent of 160*l.*; Barker paying also a further sum of 1300*l.* to the defendant: and on the 21st of August, 1873, the defendant granted a lease to Barker upon those terms.

21. Between the 2nd and 21st of August, whilst the plaintiff was occupied in the removal of his stock of wines and spirits, the premises were closed; and they remained closed for about a week after, whilst alterations were being made by the new tenant.

22. During the plaintiff's occupation of No. 90, London Road, there was a board over the shop-front, with the words "Llewellyn's Family Wine and Spirit Stores" thereon. This was removed before the 21st of August. There was no other external signboard; but over the front door the words "William Llewellyn, licensed to sell beer, wine, spirits, and tobacco," were painted; and these words remained unaltered until some days after the 21st of August, when they were obliterated by Barker's manager, and replaced by his own name. There were also boards inside each of the two windows facing the London Road, with the words "Bottled Wines" and "Spirits" thereon, which boards were purchased by Barker. These boards were in their places and visible to the public during the whole time that the house was closed,—there being no shutters.

23. Whilst the house so remained closed from the 2nd to the 21st of August, the plaintiff put in the window a paper with the following words on it,—"Removing to the White Bear, Dale Street." The premises were given up to the defendant on the 21st of August.

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24. The plaintiff opened the White Bear as an hotel and spirit vaults on the 30th of August, and is still the landlord thereof. During about a week previous to that date, there was a notice in the window of the White Bear, in these words,—"Llewellyn, late of 90, London Road;" but this was taken down when the house was opened.

25. The fixtures and fittings at No. 90, London Road belonged to the plaintiff, and were taken by Barker at a valuation; and about the 28th of August the house was re-opened as a public-house and spirit vaults, with a new sign, and with the name of Barker's manager placed there, and without anything referring to the plaintiff's having been the previous tenant thereof; and the business of a licensed victualler has since been and now is carried on upon the premises by the said manager, the licences having been transferred to him.

26. On the 26th of August the plaintiff, through his attorneys, applied to the defendant for payment of the 1300*l.* obtained from Barker; and on refusal brought this action to recover that sum and interest.

27. The business carried on by the plaintiff at No. 90, London Road consisted in about equal proportions of the supply of families in the immediate neighbourhood with liquors for domestic consumption and of the custom of persons passing by the house. The business was not in its nature capable of being to any appreciable extent transferred to another house in a different locality; and in fact none of the customers of the plaintiff (except two or three personal friends) have followed him to Dale Street. The nature of the business in this respect was known, at the time of the transactions hereinbefore referred to, to the defendant, to C. G. Rutherford, and to Barker.

28. The rental of 160*l.* per annum reserved in the lease granted to Barker was, without any premium, bonus, or other payment whatever, a full and sufficient rental for the premises under such a lease, whether intended for a licensed victualler's business or not (and, if the former, even if with a licence attached), apart from the special value which the premises possessed for a licensed victualler's, owing to the old-established and successful business which had been carried on there by the plaintiff. The value of the house

(with a licence attached) under a fourteen years' lease, if no licensed victualler's business had been previously carried on there, but the same had been a wholly untried house, with no experience of its fitness for the trade, would not have exceeded 100*l.* per annum.

29. The closing of the house for three weeks before the plaintiff left it, and for one week or thereabouts afterwards, was calculated to and did inflict some injury upon the business carried on there (the average gross takings for thirty-nine weeks after the new tenancy commenced having been 44*l.* per week); but such injury was not serious or permanent.

30. The defendant, and C. G. Rutherford, and Barker, were at the time of the transactions hereinbefore mentioned well acquainted with the general nature of the business carried on by the plaintiff, and knew that it was of very considerable value. C. G. Rutherford, in asking first the rental of 295*l.*, and afterwards the rental of 160*l.* together with the premium of 1300*l.* in lieu of the higher rental, and Barker in agreeing to the latter terms, had regard to the fact that Barker would, without any further or other payment (whether as for goodwill or otherwise), acquire together with the possession of the house all the advantages arising from the business connection attached to the house during the plaintiff's occupation which could be acquired by an incoming tenant, without the assistance or concurrence of the plaintiff; and it was in consideration of those advantages, as C. G. Rutherford at the time knew, that Barker in fact agreed to pay the 1300*l.*

31. It is usual in Liverpool for an incoming tenant of premises in which the business of a licensed victualler has been carried on to agree, upon the granting of a new lease or the assignment of an old one, to pay over and above the rent reserved by the lease a sum for and in respect of the goodwill of the business carried on in such premises; the amount varying according to the nature and extent of such business. The goodwill of the business carried on by the plaintiff would, if belonging to the owner of the house, have had a very considerable value; and if such owner had in that case been willing to grant a lease similar to that granted to Barker, a sum exceeding 1300*l.* could without difficulty have been obtained for the goodwill of such business.

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The question for the opinion of the Court was, whether, upon the facts above stated, there had been a breach by the defendant of the proviso or agreement in paragraph 5 mentioned.

If the Court should decide in the negative, judgment was to be entered for the defendant. But, if the Court should decide in the affirmative, the Court was requested to lay down the principle on which the damages were to be assessed, for the guidance of the arbitrator.

Herschell, Q.C. (*Myburgh* with him), for the plaintiff. The question is, what are the rights of the plaintiff under the proviso as to goodwill in the lease of the 1st of March, 1858. By that proviso, the tenant was to receive at the expiration of the term all such sum and sums of money as should or could be procured for the goodwill of the business of a licensed victualler in respect of the premises from an incoming tenant. That necessarily means such sum as the lessor or her assigns could get as the value of the business. The plaintiff had paid for the goodwill at the commencement of his tenancy, and by care and assiduity had, as the case finds, largely increased its value. Goodwill is thus defined by Lord Chelmsford, C., in *Austen* v. *Boys* (1),—"Where a trade is established in a particular place, the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on." It is a matter of common experience that people will continue to deal at a shop which they have been in the habit of resorting to, notwithstanding the business has changed hands. This is commonly known by the name of goodwill, and has a money value, and is every day the subject of purchase and sale. The Master of the Rolls in *Chissum* v. *Dewes* (2) defines goodwill as "nothing more than an advantage attached to the possession of the house." An equivalent for this advantage was intended to be secured to the plaintiff by this proviso. It is a proviso which is inserted in the lease in favour of the lessee: consequently it must be construed so as to give him some benefit. The statement in paragraph 30 of the special case shews that what was called "premium" was really understood by

(1) 2 De G. & J. 626, at p. 635.

(2) 5 Russ. 29, at p. 30.

4 Jur. N.S. 719. 721.

both parties to the transaction to be the price of the goodwill of the business.

Russell, Q.C. (*Baylis* with him), contrà. Goodwill in this proviso means no more than this, the sum for which the plaintiff could himself have sold his business after ceasing to be the tenant of the premises where it had been carried on. The plaintiff was bound to quit at the expiration of his lease. Having then no place where the business could be continued by him, the value of his goodwill would be scarcely appreciable. Suppose the premises ceased to be as valuable for the business of a licensed victualler as for some other business, could it be said that the defendant must still let them as a public-house? Or, suppose at the end of the plaintiff's term the defendant had insisted upon a rent of 300*l.* per annum, would the plaintiff have had any legal right to complain? The case finds that the rent which was demanded, viz. 160*l.* a year, was a fair rental, irrespective of any premium. If the plaintiff had found a suitable house next door, to which he could have transferred the business, what compensation could he have claimed from the landlady?

[BRETT, J. He could not have transferred the licences.]

The plaintiff might have entered into a negotiation as to goodwill with the incoming tenant. There was nothing to prevent his doing so. In *Churton* v. *Douglas* (1), Page Wood, V.C., defines goodwill to mean every advantage that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the late firm. At all events, the 1300*l.* paid by Barker by way of premium on the grant of the lease to him, is not to be assumed to be the criterion of value of the goodwill of the business. Nor is the increased value of property in the neighbourhood to be considered as a circumstance which is to enure to the benefit of the late tenant, but solely to that of the landlord. At the very highest, the compensation to be awarded to the plaintiff must be such a sum as an incoming tenant would give to stand in the shoes of the plaintiff, taking the chance of obtaining a renewed lease from the landlord.

Myburgh, in reply, was stopped by the Court.

(1) Johns. 174, at p. 188.

5 Jun 1887 8 90

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LORD COLERIDGE, C.J. In this case the plaintiff seeks to recover damages for an alleged breach of a covenant in a lease. The defendant was the owner of a public-house, of which the plaintiff was for some years tenant under two several leases. In August, 1873, the plaintiff's tenancy was finally determined. Upon the determination of the lease, the plaintiff removed to another public-house, and then a question arose what, if anything, he was entitled to receive under the following proviso,—"Provided also and it is hereby lastly agreed and declared that, at the expiration or other sooner determination of the term hereby created, all such sum and sums of money as shall or can be procured for the goodwill of the business of a licensed victualler in respect of the said premises from an incoming tenant shall be received by and belong to the lessee, his executors, administrators, or assigns."

The facts shew that two different views of that proviso or agreement have been entertained. Prior to the expiration of the second lease, the parties were negotiating for a renewal of the term. The landlady claimed an increased rent, and 1000*l.* by way of premium. The plaintiff contended that the 1000*l.* was money payable for goodwill, which under the proviso would properly belong to him, and not to the landlady. That being the contention between the parties, the negotiation fell through. The plaintiff's lease having come to an end, the defendant granted a fresh lease of the premises to one Barker at the yearly rent of 160*l.* and a premium of 1300*l.* for a fourteen years' lease. It is found in the case that nothing under the name of goodwill was paid by Barker to the defendant; nor did any negotiation for any goodwill take place between the outgoing and the incoming tenant under the proviso.

It is found in the case that "the rental of 160*l.* per annum reserved in the lease granted to Barker was, without any premium, bonus, or other payment whatsoever, a full and sufficient rental for the premises under such a lease, whether intended for a licensed victualler's business or not (and, if the former, even if with a licence attached), apart from the special value which the premises possessed for a licensed victualler's, owing to the old-established and successful business which had been carried on

there by the plaintiff. The value of the house (with a licence attached) under a fourteen years' lease, if no licensed victualler's business had been previously carried on there, but the same had been a wholly untried house, with no experience of its fitness for the trade, would not have exceeded 100*l.* per annum." And it is further found that "the goodwill of the business carried on by the plaintiff would, if belonging to the owner of the house, have had a very considerable value; and if such owner had in that case been willing to grant a lease similar to that granted to Barker, a sum exceeding 1300*l.* could without difficulty have been obtained for the goodwill of such business." These matters are found as facts.

The first question is, whether the plaintiff is entitled to anything. That is not denied by Mr. Russell, nor could it be denied. The proviso is framed for the benefit of the outgoing tenant. Upon what principle is the sum which he is to receive to be assessed? Here is a public-house in which a thriving business has been carried on, having attached to it that which has been variously described as goodwill,—a thing which has an appreciable value and is every day bought and sold. That goodwill the tenant is about to forego. In the absence of a stipulation to the contrary, it would be an increased value of the premises, which on the tenant's going away would enure to the benefit of the landlord: he might let them for an increased rent or he might obtain a premium. In the absence of a stipulation, the tenant could derive no advantage from such increased value. The end of the term having arrived, all he could take away would be the stock-in-trade and the tenant's fixtures. The goodwill is lost to him. But by this proviso, which, as I before observed, is introduced in favour of the tenant, the latter is to have something for the goodwill at the expiration of the tenancy. What is he to have? "Such sum of money as shall or can be procured for the goodwill of the business of a licensed victualler in respect of the said premises from an incoming tenant." Upon consideration, it seems to me that that means substantially what Mr. Herschell has contended. If the goodwill is actually sold, and sold honestly, the tenant would receive the amount paid for it. But, inasmuch as the landlord might choose to forego the goodwill, or to discontinue to use the

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premises for a public-house, the tenant would in that case be entitled to recover from the landlord such sum as the latter would have received from an incoming tenant who continued to carry on the same business. It would be difficult for us to determine what the sum should be. I should say it ought to be such a sum as persons who are in the habit of estimating such things would fix as the value of the goodwill of the premises under ordinary circumstances. By arrangement, this is left to the determination of the arbitrator, who will receive the evidence of persons accustomed to the trade of valuing.

Two suggestions were made in the course of the argument, which it may be as well to negative. I should be of opinion that the 1300*l.* which was paid by Barker is not to be considered by the arbitrator as limiting his inquiry one way or the other. It may be that the value of the goodwill would under ordinary circumstances exceed the 1300*l.*, or it may be that it would be greatly under that sum: it may be that the 1300*l.* may include premium, or a sum paid in consideration of a diminished rent. These, however, are matters upon which the Court can arrive at no certain conclusion. All we can say is that the 1300*l.* is not to be considered by the arbitrator as an absolute guide in fixing the amount to be paid as goodwill.

On the other hand, it is said that the arbitrator is not to take into account the increased value of the goodwill, by reason of the general improvement of the locality. Mr. Russell says it must be limited to personal goodwill. I do not assent to that. If by reason of the rise in the value of property in the neighbourhood the saleable value of the business has increased, that is a favourable chance which has befallen the tenant; if, on the other hand, the value of property in the neighbourhood had declined, and so the saleable value of the business or goodwill had become diminished, that would have operated against the tenant. As he would be bound in the one case to bear the loss, it would be wrong to reject the general increase of value as an element in his favour. It is enough to say that the plaintiff is clearly entitled to receive something for the goodwill of the business, and that it seems to me that that sum should be such as persons who are in the habit of valuing property of that description as between vendor and purchaser

should, under the whole of the circumstances, find to be reasonable and just.

BRETT, J. In some classes of business, where the trade has long been carried on in a profitable manner in a particular house, and a new tenant comes in and continues to carry on the same business there, it is found by experience that many, if not all, of the customers resort there as before. This is found so regularly to happen, that it has become usual to pay a money value for it, which is commonly called "goodwill." It may be that there may be a species of goodwill which may be the subject of bargain and sale, although not dependent on the business being carried on in any particular place; for instance, in the case of what are called quack medicines. But, when we come to speak of the goodwill of a public-house, it is obvious that it is a thing which is attached to a locality. The attractiveness of the building, the quality of the articles supplied there, and the personal qualifications of the individual who conducts the business, all combine to create a trade which is likely to be continued at the particular house. The only person who can make a profit of this is, in general, the person who is about to cede it to another. During the continuance of his lease, the tenant is the person who alone can sell the goodwill; it is a matter arising wholly between the incoming and the outgoing tenant. Where, however, the lease has come to an end, the tenant has no longer any option. It is in the option of the landlord to renew the lease or not, or to grant a lease to a new tenant. If the old tenant wishes to renew, he usually agrees with the landlord for an increased rent or for a premium. In the present case, however, another arrangement was made, which is by no means infrequent. When the plaintiff took a lease of the premises in question in July, 1845, he stipulated that the landlord should at the expiration of the term allow him to receive "all such sum and sums of money as shall or can be procured for the goodwill of the business of a licensed victualler, in respect of the premises from an incoming tenant." The landlord does not covenant to pay a goodwill, but that, whether he obtains a sum for the goodwill or not from an incoming tenant, the outgoing tenant shall at the end of the term receive such a sum as, if the premises were let upon

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ordinary terms, the incoming tenant would pay to him as for goodwill. To say that the words, "or can be procured for goodwill," mean "shall be obtained in the name of goodwill," is to violate one of the canons of construction, which is, that a meaning shall be given to every word of a written contract, if the grammatical construction of the sentence will admit of it. For these reasons I think the plaintiff is clearly entitled to recover something.

The next question is, what is the proper measure of compensation? I think Mr. Russell was quite right in saying that the defendant was not bound to re-let the premises at all. He was at liberty to cease using them for the business of a licensed victualler. And, if he did let them for a public-house, he was not bound to let them at a goodwill. If he chose, he might carry on the business himself, or he might let it to his brother or his nephew, without stipulating for any goodwill. But what he covenanted to pay the plaintiff was, such a sum as he *could* obtain as goodwill from a new tenant who should continue to carry on the business as before. I agree that the arbitrator is not to take the 1300*l.* which was paid by Barker as a precise and absolute criterion of value. But he must allow such a sum as a valuer who is in the habit of assessing compensations of this kind under ordinary circumstances would estimate as the value of the goodwill, and taking into consideration the known habits of the magistrates in the grant or the transfer of licences. It has been suggested as against the plaintiff that the arbitrator should not allow him anything in respect of the improved condition of the neighbourhood. That, however, would not be just. If the property in the neighbourhood had decreased in value, the goodwill might have become worth little or nothing. That would be a loss which would have fallen on the plaintiff. On the other hand, if the value of property in the neighbourhood has increased, that would be the tenant's gain.

ARCHIBALD, J. I also am of opinion that our judgment should be in favour of the plaintiff; and I do not think it necessary to add much to what has fallen from my Lord and my Brother Brett. Two questions are raised here: 1. Whether there has been a breach of the proviso or agreement contained in the lease of March, 1858. 2. What is the proper principle upon which the damages

for the breach are to be assessed? By the terms of the proviso, the plaintiff is to receive, at the expiration of his term, such sum as may or can be obtained for the goodwill of the business from a new tenant. As nothing was in fact received in the name of goodwill, it is said there is no breach of this proviso. But, upon the facts found in the case, it must be conceded that something considerable could have been obtained for the goodwill; and that being so, there is a clear breach. Then, as to the principle upon which the damages for that breach are to be assessed, I entirely agree with my Lord and my Brother Brett that the 1300*l.* received from Barker under the name of "premium" is to be put aside, and that the arbitrator must ascertain as well as he can the actual value of the goodwill of the plaintiff's business, without taking that sum into account. He must not, however, disregard the general improvement of the neighbourhood, any more than he would its deterioration. I do not differ from the principle laid down by my Lord and my Brother Brett, viz. that the amount of goodwill is to be ascertained in the way in which persons whose business it is to value these things proceed to determine the value. I do not think there will be much difficulty in doing this. The effect of the proviso is, that the value of the goodwill shall not be lost to the plaintiff upon the expiration of his lease, as but for that stipulation it would have been.

Judgment for the plaintiff.

Attorneys for plaintiff: *Burton, Yeates, & Hart, for Fryer, Smith, & Kenion, Liverpool.*

Attorneys for defendant: *Gregory & Rowcliffes.*

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May 6.

RE MATILDA EDSALL. RE EMILY THOMAS.

Acknowledgment by Married Woman under 3 & 4 Wm. 4, c. 74—Filing Documents—Special Commission not returned.

The acknowledgment of a deed by a married woman, under 3 & 4 Wm. 4, c. 74, was taken before special commissioners in Melbourne, but the documents were by mistake returned to this country without having the commission annexed to them:—

The Court,—upon being satisfied by affidavit that the acknowledgment had been properly taken by two of the persons to whom the commission was addressed,—allowed the documents to be filed.

The omission of one of three Christian names of one of the commissioners allowed to be supplied by an affidavit of identity.

ON the 21st of March, 1874, a special commission was issued appointing William Worth Creber, Robert William Nutt, Arthur Palmer Blake, and Isaac Cooke Seddon, of Melbourne, or any two of them, special commissioners to take the acknowledgments of Matilda Edsall, wife of Brook Edsall, and Emily Thomas, wife of William Thomas, residing at that place, of certain deeds by which it was intended to pass their interest in certain property under the 3 & 4 Wm. 4, c. 74,—the commission to be returned to the proper office on or before the 1st of January, 1875.

The commission was sent out on the 23rd of March to William *James* Worth Creber, solicitor, Melbourne, with the ingrossments of the conveyances: it was directed to him as "William Worth Creber," the name *James* being omitted by mistake. On the 30th of August, 1874, the deeds, duly executed and acknowledged by Matilda Edsall and Emily Thomas, were, with the affidavits and certificates of acknowledgment duly sworn to and signed respectively, returned by William *James* Worth Creber, together with an affidavit by him that he was the person to whom the commission was intended to be directed, and that he saw the deeds executed by Mrs. Edsall and Mrs. Thomas. The special commission, however, was not returned, and in consequence of that omission the officer declined to file the acknowledgment.

The certificate of acknowledgment was signed by William James Worth Creber and Arthur Palmer Blake, and attested by a notary public. The purchase was to have been completed in December

last, but the purchaser required the documents to be filed before he would complete. 1875

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Mortimer moved that the officer might be directed to receive and file the documents. He submitted that the certificate of acknowledgment and affidavit of verification abundantly cured the blunder, for that, unless the special commission went to Melbourne, the deeds could not have been executed or acknowledged.

LORD COLERIDGE, C.J. You may take an order. The commission is absent; but we think the materials brought before us are sufficient to supply the want of it. The certificate and affidavit of verification shew that the acknowledgment was duly taken at Melbourne in pursuance of the commission; and one of the commissioners who acted makes an affidavit that he was one of the persons to whom the commission was directed, and that he saw the married women execute the deeds.

Fiat.

Attorneys for applicant: *Yarde & Loader, for Whidborne & Tozer, Teignmouth.*

RE ELEANOR MARY MANN. *April* 15.

Acknowledgment by Married Woman under 3 & 4 *Wm.* 4, *c.* 74—*Affidavit of Verification sworn in Guernsey.*

The affidavit verifying the certificate of the due taking of an acknowledgment of a married woman under 3 & 4 Wm. 4, c. 74, may be sworn in Guernsey before the chief bailiff and two jurats of that island.

SPECIAL commissioners were appointed to take the acknowledgment of Eleanor Mary Mann, a married woman, in Guernsey, under 3 & 4 Wm. 4, c. 74. The acknowledgment was duly taken before the two commissioners, and the affidavit verifying the certificate (made by one of them) was sworn before "the chief bailiff and two jurats" of the island.

Upon production of an affidavit that there is no commissioner in the island of Guernsey authorized to administer oaths in the superior Courts, and a notarial certificate verifying the signatures

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RE MANN.

of the bailiff and jurats, and stating that they were duly qualified and authorized to administer oaths in the island,

THE COURT, on the motion of *Bowen*, ordered the documents to be filed.

Fiat.

Attorneys for applicants: *A. & A. Ranken Ford.*

May 6.

HOLMES *v.* MOUNTSTEPHEN AND OTHERS.

Practice—Materials for Appeal from Chambers.

All material affidavits used upon a summons at Chambers must be referred to in the rule, upon an appeal to the Court.

Upon an application at Chambers to remit a cause for trial in a county court, under 30 & 31 Vict. c. 142, s. 10, the defendant's affidavit disclosed the nature of the cause of action, and alleged that the plaintiff had no visible means of paying the costs of the action if he should fail to recover a verdict:—

Held, that this was a material affidavit, and ought to have been produced by the plaintiff upon an application to rescind the order on the ground that the cause was a fit one to be tried in a superior Court.

UPON an affidavit of J. I. Gribble, one of the defendants, that the action was brought against him and the other defendants to recover damages for an alleged trespass in breaking and entering the plaintiff's dwelling-house and seizing his goods in execution, and that the plaintiff had no visible means of paying the costs of the action if he should fail to recover a verdict, Master Benett, on the 17th of April, made an order "that, unless the plaintiff shall, within seven days, give full security for the defendants' costs to the satisfaction of one of the masters of this Court, this cause be remitted for trial before the county court of Surrey, holden at Southwark." This order was afterwards confirmed, on appeal, by Huddleston, J., on the 21st.

Wetherfield obtained a rule nisi to rescind that order, on the ground that grave questions of law were likely to arise on the trial of this cause, and therefore it was a fit case to be tried in the superior Court. The rule was drawn up "on reading the affidavit of John Holmes and George Manley Wetherfield."

Poulton shewed cause. This order is made under s. 10 of the County Court Act, 1867 (30 & 31 Vict. c. 142). This rule being an appeal from a decision at Chambers, it was incumbent on the plaintiff to bring before the Court all relevant materials which were used before the judge or the master: *Bennett* v. *Benham.* (1) Here the affidavit of the defendant Gribble, upon which the order was made, is not brought before the Court. That the master had jurisdiction to make the order cannot now be disputed: *Palmer* v. *Roberts* (2); *Walsh* v. *Smith.* (3)

[LORD COLERIDGE, C.J. What answer has Mr. Wetherfield to the case of *Bennett* v. *Benham* (1), which was decided after reference to *Warman* v. *Halahan* (4) in the Queen's Bench, and after time taken to consider?]

Wetherfield. Gribble's affidavit has no relevancy to the matter of this motion. It was merely addressed to the plaintiff's visible means of paying costs if unsuccessful in the action. It was no part of the materials used by the plaintiff before the master or the judge.

LORD COLERIDGE, C.J. I am of opinion that this rule should be discharged. It appears to be a rule of practice, and it is a good and a sensible rule, that, upon an appeal from a decision of a judge at Chambers, the rule must be drawn up upon reading all relevant affidavits which were used there, and any additional ones which may be necessary. This was decided by the Court of Queen's Bench in *Warman* v. *Halahan* (4), and assented to by this Court, with a qualification, in *Bennett* v. *Benham.* (1) The only question remaining is, whether the affidavit in question comes within the qualification,—whether the affidavit of Mr. Gribble was relevant. I think it clearly was. It is not confined merely to the means of the plaintiff to pay costs if unsuccessful, but goes on to shew the circumstances under which the action was brought. I cannot see what could be relevant matter if this is not so.

DENMAN, J. This rule seeks to rescind an order of a master for remitting the cause for trial before a county court. If the affidavit used at Chambers on the application for that order had been con-

(1) 15 C. B. (N.S.) 616; 33 L. J. (C.P.) 153.
(2) 29 L. T. 403.
(3) 30 L. T. 304.
(4) 30 L. J. (Q.B.) 48.

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fined to a statement that the plaintiff had no visible means of paying the costs of the action if he should fail to recover a verdict, I should have thought it was at least doubtful whether it was relevant to the matter now before the Court. That all relevant materials used on obtaining an order at Chambers must be produced before the Court when the decision at Chambers is appealed against is clearly laid down by the two cases of *Warman* v. *Halahan* (1) and *Bennett* v. *Benham*. (2) That seems to me to be a wholesome rule.

HUDDLESTON, J. The affidavit in question was necessary to give the master jurisdiction. It is clearly a reasonable rule that all relevant materials used at Chambers should be produced before the Court upon a motion to rescind an order. That is settled by the two cases referred to. This is manifestly a wholesome rule, and it has not been complied with here. This rule, therefore, must be discharged with costs.

Rule discharged.

Attorney for plaintiff: *G. M. Wetherfield.*
Attorneys for defendants: *Tillyard & Gribble.*

May 8.

BARNSTAPLE MUNICIPAL ELECTION PETITION.

NORTHCOTE, PETITIONER; PULSFORD AND ANOTHER, RESPONDENTS.

Municipal Election Petition—Double Nomination—Ballot Act, 1872 (35 & 36 *Vict. c.* 33)—*Defect in Nomination.*

A candidate at a municipal election was twice nominated, one nomination being good, but the other being bad. His name appeared in the ballot papers twice, once in respect of each nomination. 71 voters appended their marks to his name under one nomination, and 301 under the other. All the voters so voting intended to vote for the candidate, and if both classes of voters could be added together, he had a majority, and was entitled to be returned:—

Held, that having been duly nominated, and having a majority of votes, he was entitled to be returned.

Held, also, that the defect in the bad nomination was not cured by the 12th and 13th rules of the 1st schedule of the Ballot Act, inasmuch as those rules do not apply to the nomination at a municipal election.

CASE stated for the opinion of the Court in pursuance of a judge's order under the provisions of s. 15, subs. 6 of the Corrupt Practices Municipal Elections Act, 1872.

(1) 30 L. J. (Q.B.) 48. (2) 15 C. B. (N.S.) 616; 33 L. J. (C.P.) 153.

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The facts were in substance as follows:—

The petition claimed that the petitioner ought to have been declared elected instead of the respondent Pulsford. The election in question was an election of three councillors for the north ward of the borough of Barnstaple, which took place on the 2nd of November, 1874, when Thomas Clifford, James Harris, Henry Hartop, Thomas May, Charles Edward Northcote, the petitioner, and John Pulsford, one of the respondents, were candidates, and James Harris, Thomas May, and John Pulsford were declared to be duly elected.

On the 11th of November, 1874, the petition was presented. The name of the petitioner appeared twice on the burgess roll of the borough, as follows: "In the North Ward—Parish: Barnstaple. Name: Northcote, Charles Edward. Property: Office Building. Street, Lane, &c.: Boutport Street. In the South Ward—Parish: Bishop's Tawton. Name: Northcote, Charles Edward. Property: House. Street, Lane, &c.: South Street." There was no other person named Charles Edward Northcote upon the said burgess roll. The petitioner was duly nominated as a candidate at the said election by the name and description of "Northcote, Charles Edward, South Street, Bishop's Tawton, land agent." The petitioner was afterwards, and without his knowledge or consent, also nominated in writing by one of the burgesses of the north ward as a candidate at the said election by the name and description of "Northcote, Charles Edward, Boutport Street, Barnstaple, gentleman." At the time when the burgess roll was made up, and from that time to the present time, the premises in Boutport Street were and have been an office only, where the petitioner carried on his business as a land agent; but neither he nor any of his family during the time aforesaid slept or lived upon those premises; but he and his family, during the time aforesaid, slept or lived in the house in South Street, in Bishop's Tawton aforesaid, which is in the south ward, within the borough of Barnstaple. In the form of ballot paper the name of the petitioner appeared twice as follows: "5. Northcote, Charles Edward, of Boutport Street, Barnstaple, gentleman. 6. Northcote, Charles Edward, of South Street, Bishop's Tawton, land agent." At the counting of the votes, it appeared that 71 electors had marked a cross upon their respective ballot

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papers opposite to the name of Northcote No. 5; 301 electors had marked a cross upon their respective ballot papers opposite the name of Northcote No. 6. Of the said 71 and 301 electors, 8 only had marked crosses opposite to both names, Northcote No. 5 and Northcote No. 6. Harris and May had respectively 508 and 372 votes, and Pulsford 339: Clifford and Hartop had 8 and 14 votes respectively. The petitioner claimed to be elected together with Harris and May, instead of Pulsford. The presiding alderman, who was the other respondent to the petition, declared Harris, May, and Pulsford elected.

The question for the Court was whether the respondent Pulsford or the petitioner was duly elected.

Gorst (with him *G. Lewis*), for the petitioner, admitted that one of the nominations of the petitioner was bad, but contended that the other being good, and both the 71 and 301 voters having in fact intended to vote for the petitioner, he was duly nominated, and had a majority of votes, and therefore was entitled to be elected; secondly, that the 12th and 13th rules in the 1st schedule of the Ballot Act, 35 & 36 Vict. c. 33, which confine objections to the mode of nomination to the period of one hour after the expiration of the time appointed for the election, applied to municipal elections, and, consequently, both nominations must be taken as good.

Tennant, for the respondent, contended that the 12th and 13th rules were not applicable to municipal elections, and that, one of the nominations being bad, the votes given to the candidate in respect of that nomination could not be counted.

Gorst, in reply.

Cur. adv. vult.

May 8. The judgment of the Court (Brett, Denman, and Archibald, JJ.,) was delivered by

BRETT, J. At the time of the passing of the Ballot Act (35 & 36 Vict. c. 33), parliamentary elections were conducted partly according to the common law practice and partly as regulated by the parliamentary election statutes. The mode of conducting such elections is so well known that it is unnecessary to describe it. Municipal elections were conducted according to the regu-

lations of the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, and the Municipal Elections Act, 22 Vict. c. 35.

By s. 30 of the former statute it was enacted, that, "upon the 1st day of November in every year, the burgesses inrolled in every borough should openly assemble, and elect from the persons qualified to be councillors the councillors of such borough," &c. By s. 32, "every election of councillors, &c., shall be held before the mayor and assessors, &c., and the voting at every such election shall commence at 9 o'clock in the forenoon and shall finally close at 4 o'clock in the afternoon of the same day," &c. By the Act 22 Vict. c. 35, s. 6, "at any election of councillors, &c., any person entitled to vote may nominate for the office of councillor, &c., any person, &c., and every such nomination shall be in writing, and shall state the Christian names and surnames of the persons nominated, with their respective places of abode and descriptions, and shall be signed by the party nominating, and sent to the town-clerk at least two whole days (Sunday excluded) before the day of election." By s. 7, any nomination-paper may be in the form contained in the schedule to the Act annexed, or "to the like effect." By s. 8, "at any election of councillors, &c., if the number of persons so nominated shall exceed the number to be elected, the councillors to be elected shall be elected from the persons so nominated, and from them only. If the number of persons so nominated shall be the same as the number to be elected, such persons shall be deemed to be elected; and the mayor, &c., shall publish a list of the names of the persons so elected not later than 11 o'clock in the morning of the said day of election."

In both parliamentary and municipal elections, then, there was the nomination, which took place whether the election was contested or not; and in both, if there was a contest, the election was naturally divided into three periods; the first including the nomination and all necessary to be done up to the moment of its being determined that a poll must be taken, and the second and third including the taking of a poll and declaring the result of it. The mode of voting at the poll was the same in both, but the mode of nominating candidates was different; such nomination at parliamentary elections being in a traditionary manner by speech, but

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in municipal elections in a regulated manner by nomination-papers. It was in this state of things that the Ballot Act was passed; and the first point to be considered is, the manner in which and the phraseology by which it deals with the necessarily distinct periods of an election.

It seems to us to deal distinctly with three periods of an election: first, with the period up to the time of the determination that a poll must be taken; secondly, with the period of the taking the poll; thirdly, with the period of ascertaining and declaring the result of the poll.

The statute begins by dealing only with parliamentary elections. The greater part of the Act deals naturally with the new mode of taking the poll at a parliamentary election. But s. 1 and rules 1 to 12 inclusive deal with the new mode of nomination at parliamentary elections. By s. 1, "a candidate for election to serve in parliament for a county or borough shall be nominated in writing." The writing shall be delivered during "the time appointed for the election." If, at the expiration of one hour "after the time appointed for the election," no more candidates stand nominated than there are vacancies to be filled up, the returning officer shall forthwith declare the candidates who may stand nominated to be elected, &c.; but, if on the expiration of such hour more candidates stand nominated than there are vacancies to be filled up, the returning officer shall "adjourn the election," and shall "take a poll." Here, the first period is distinctly defined, and the phrase used to describe it is, "the time appointed for the election," and "the expiration of one hour after the time appointed for the election." The second period is described as the time during which the returning officer "shall adjourn the election and shall take a poll," and the time "after the adjournment of an election by the returning officer for the purpose of taking a poll." That which is called "the election" is separated from that which is called "the taking a poll," and the former is adjourned whilst the latter is taking place.

So, in rule 1 of schedule 1, "Rules for Parliamentary Elections," "the returning officer shall give public notice of the day on which and the place at which he will proceed to an election," and of "the time appointed for the election," and of the day on which "the

poll will be taken," in case "the election" is contested. By rule 2, "the day of election" shall be fixed. By rule 3, "the place of election" shall be "a convenient room." In this rule, "the election" which is to take place in a room, is obviously only the nomination. So, by rule 4, "the time appointed for 'the election' shall be such two hours between the hours of 10 in the forenoon and 3 in the afternoon as may be appointed." These two hours are obviously the time of an uncontested election, or of the nomination only, if the election is contested. Rules 5 and 6 regulate the mode of nomination at a parliamentary election. By rule 8, "the nomination-papers shall be delivered to the returning officer at the place of election, during the time appointed for the election." Here, the place is that described in rule 3, and the time is that described in rule 4; and the first is not the place at which, and the second is not the time during which, a poll can be taken. Rules 12 and 13 (which must hereafter again be noticed) apply to the nomination period, and are still within the division of the statute headed "Rules for Parliamentary Elections." By rule 12, "a person shall not be entitled to have his name inserted in any ballot-paper as a candidate, unless he has been nominated in manner provided by this Act; and every person whose nomination-paper has been delivered to the returning officer 'during the time appointed for the election,' shall be deemed to have been nominated in manner provided by this Act, unless objection be made to his nomination-paper by the returning officer or some other person before the expiration of the time appointed for the election, or within one hour afterwards." And by rule 13, "the returning officer shall decide on the validity of every objection made to a nomination-paper; and his decision, if disallowing the objection, shall be final; but, if allowing the same, shall be subject to reversal on petition questioning the election or return."

The period of "the taking the poll" is dealt with in s. 2 and many subsequent sections, and in the rules commencing with rule 14, under the heading or division of "The poll." By s. 2, "in the case of a poll at an election, the votes shall be given by ballot. The ballot of each voter shall consist of a paper (in this Act called a ballot-paper) shewing the names and description of the candidates." The ballot is to take place at polling stations. The mode

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of taking the ballot is regulated by many sections and by the rules 14 to 30.

Nothing can be more distinctly divided in treatment or in words than that which is in the Ballot Act called "the election," from that which is called "taking the poll." Up to this point of the judgment, then, we have at a municipal election the nomination and polling, if a poll be taken, regulated by the Municipal Election statutes, and the nomination and polling at a parliamentary election regulated by the new legislation of the Ballot Act, and in both cases a sharp distinction drawn between the period of nomination and the period of polling.

Now is to be considered whether all, or, if only a part, how much of the procedure at a municipal election is altered by the Ballot Act. That statute is divided into parts. Part 1 is intituled "Parliamentary Elections," and is divided into sections from 1 to 19 inclusive. Then follows Part 2, intituled "Municipal Elections." These elections have not been mentioned in Part 1. By s. 20, which is the first which deals with municipal elections, "the *poll at* every *contested* municipal election shall, so far as circumstances admit, be conducted in the manner in which the poll is by this Act directed to be conducted at a contested parliamentary election, and, subject to the modifications expressed in the schedules annexed hereto, such provisions of this Act and of the said schedules as *relate to or are concerned with a poll* at a parliamentary election shall apply to *a poll* at a contested municipal election;" and "a municipal election shall, *except in so far as relates to the taking of the poll in the event of its being contested*, be conducted in the manner in which it would have been conducted if this Act had not passed."

In the first part of the section it is not a municipal election which is mentioned, nor even a contested municipal election, but *the poll at* a *contested* municipal election; and it is not a parliamentary election to which it is assimilated, but *the poll at* a *contested* parliamentary election; and, in the second part, a municipal election shall be conducted in the same manner as before, "*except in so far as relates to the taking of the poll in the event of its being contested.*" If there is no contest, the whole municipal election is to be conducted as before; and, considering the plain division

made in the Act, as before pointed out, between the other parts of an election and the poll or the taking of the poll, it cannot, upon consideration, be held that the provisions as to the nomination are within the meaning of this section, such provisions "as relate to or are concerned with" the poll. The nomination, therefore, and all proceedings with regard to it, are to be conducted as before, i.e. according to the statutes 5 & 6 Wm. 4, c. 76, and 22 Vict. c. 35, except in this, that, according to the note at the end of the form of the nomination-paper in schedule 2, "the *form* of nomination-paper in a municipal election shall, as nearly as circumstances will admit, be the same as in the case of a parliamentary election."

Considering the construction of s. 20, and its affirmative and negative restriction of the effect of the Ballot Act in municipal elections to the conduct of the taking of the poll alone, this note is, in our opinion, not sufficient to authorize any alteration in the substantial requisites under the former statutes of a nomination at a municipal election. We are, therefore, of opinion that the mode of conducting the nomination at a municipal election, whether contested or uncontested, is still regulated by the municipal election statutes, and that no defect in a nomination which would be fatal under those statutes can be cured by rules 12 or 13 of the Ballot Act. As the nomination is not to be made "in the manner provided by the Ballot Act," those rules are by their terms prevented from being applicable. And s. 13 is also inapplicable to any defect but one in a nomination at a municipal election, because such defect, unless it be in the mere form of the nomination-paper, is not a non-compliance with the rules contained in the 1st schedule or a mistake in the use of the forms in the 2nd schedule to the Ballot Act.

Turning now from the interpretation of the Ballot Act to its application to the points raised as to the conduct of the election in question, it is admitted that one nomination of the appellant, Mr. Edward Northcote, viz. that represented as No. 5, was a bad and void nomination under the municipal election statutes: *Reg.* v. *Coward.* (1) If it had been the only nomination, the candidature of the appellant ought to have been rejected. But the appellant was by another nomination-paper, that represented as

(1) 16 Q. B. 819; 20 L. J. (Q.B.) 359.

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No. 6, well nominated. It was impossible, therefore, as it seems to us, to reject his candidature. Suppose there had been but one vacancy, and the appellant had been the only person nominated, but once by a bad and once by a good nomination, it is absurd to say that the bad nomination would destroy the good one. He must have been at once declared duly elected upon the good nomination.

The suggestion that the returning officer ought not to inquire whether two nominations of the same name do or do not apply to the same person, would lead to this, that, if the same person were twice nominated for one vacancy, and no one else were nominated, yet there must be a poll by ballot for the two names, but one person. The statement of such a proposition proves its absurdity. It is obviously the duty of the returning officer to inquire whether nominations which might apply to one or to different persons are of the same or of different persons. A bad nomination cannot avoid a good nomination of the same person. Mr. Northcote was therefore a candidate properly nominated, and there were other candidates properly nominated, and there were more candidates nominated than there were vacancies to be filled up. It was then, by necessity and the terms of all the statutes, the duty of the returning officer to take a poll. From that point, the sections and rules of the Ballot Act which apply to the conduct of a poll were by the terms of s. 20 applicable, and the poll was to be taken according to the sections and rules in the Act.

By rule 22, "each ballot paper shall contain a *list of the candidates* described as in their respective nomination-papers." A question is raised whether the name of a candidate twice nominated ought by virtue of this rule to be twice entered in the ballot-paper. It is suggested that, if it is not, he will not be described as in his nomination-paper. This is one of the sort of points which must arise upon such statutes. No one foresaw the exact difficulty of dealing in this respect with a double nomination. The answer to the difficulty seems to be, that, inasmuch as the ballot-paper is to contain a list of the *candidates*, and not a list of their *nominations*, the returning officer should enter the name of the candidate, and either describe him only as in his correct nomination-paper, or append to his name the descriptions in any of his nomination-

papers which differ,—as thus, "Charles Edward Northcote, described in one nomination-paper as of Bridport Street, Barnstaple, gentleman, and in another as of South Street, Bishop Tawton, land agent." To enter his name twice, as if he were two candidates, is obviously wrong as matter of sense, and is contrary to the words of the rule. The ballot-paper in the present case was therefore wrongly drawn up. Still Mr. Northcote was a candidate, and 372 electors voted for him, intending to vote for him. It is true that 71 voted for him under his description in No. 5, and 301 under his description in No. 6. If both the 71 and 301 votes can be counted as votes given for him, he was duly elected, and so, even though eight votes should be struck off on the ground that eight voters put two crosses to indicate their vote, one to No. 5, and one to No. 6. The question is, whether all the votes given for him should be counted as votes given for him. The counting, it would seem, should be under s. 35 of 5 & 6 Wm. 4, c. 76, as amended by the schedule of the Ballot Act. That, s. 35, enacts that "the mayor and assessors shall examine the voting papers so delivered as aforesaid, for the purpose of ascertaining which of *the several persons voted for* are elected; and *so many* of *such persons*, being equal to the number of persons then to be chosen, as shall have the greater number of votes shall be deemed to be elected." If the votes in the present case had been counted and treated according to the words of that section, the number of votes really given for the appellant entitled him to be declared to be elected. There is nothing to prevent the counting and treating of the votes according to the words of that section and according to the truth, but the irregular form of the ballot-paper. That irregularity of form neither deceived or misled any voter into voting for a wrong person. It was an irregularity or mistake in the form of the ballot-paper, the form of which is given in schedule 2 of the Ballot Act. As the mistake neither deceived nor misled any voter into voting for a wrong person, it may properly be said that it did not affect the result of the election.

The mistake therefore was, as it seems to us, cured by s. 13 of the Ballot Act, which enacts that "no election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the

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forms in the second schedule to this Act, if it appears, &c., that the election was conducted in accordance with the principles laid down in the body of this Act, and *that such non-compliance or mistake did not affect the result of the election.*" That section is applicable to the taking of the poll, and the poll at a municipal election is to be taken or conducted according to the provisions applicable to a poll of the Ballot Act. That section is, therefore, applicable to the taking of the poll at a municipal election.

For these reasons we are of opinion that the appellant was duly elected, and that the return should be amended accordingly.

Judgment for the petitioner.

Gorst, for the petitioner, on a subsequent day applied for costs, but the Court refused to allow them.

Agents for petitioner: *Guscotte, Wadham, & Daw.*
Agents for respondent: *Church, Sons, & Co.*

May 6.

RICHARDSON *v.* THE GREAT EASTERN RAILWAY COMPANY.

Railway Company—Negligence in allowing an unsound Truck to travel on the Line without due Examination.

The Great Eastern Railway Company have a junction at Peterborough, at which junction they receive from other lines merchandise in trucks to the extent of more than 20,000 weekly, to be conveyed by them to London. In the course of a journey from Peterborough to London, one of these foreign trucks, laden with coal, broke down in consequence of the fracture of an axle, and caused the break-van to come into collision with a passenger-train, whereby the plaintiff (a passenger) sustained injury. The truck in question belonged to a waggon company, whose duty it was to keep it in repair.

The course of business at Peterborough was, that every truck, before coming on to the defendants' line underwent some kind of examination as to its general fitness to travel. The particular truck, when submitted to such examination, was found to have a defective spring, and a serious crack in one of its main timbers, and it was accordingly taken into a siding, and was detained there four or five days, for the purpose of having a new spring put on. The truck (which had not been unloaded) was then sent on, with a direction chalked on it by a servant of the waggon company, that it should "stop at Peterborough for repairs when empty." Upon a minute examination of the truck after the accident, it was found that the fore-axle, which was 3½ inches thick, had across it, near the

wheel, an old crack an inch and a quarter deep, and this was admitted to have been the sole cause of the break-down.

There was conflicting evidence as to whether or not, regard being had to the extent of the traffic at the junction, it was possible to have discovered this defect in the axle by any practicable examination at Peterborough; and the following questions were submitted to the jury—1. Would the defect in the axle which was the cause of the accident have been discovered or discoverable upon any fit and careful examination of it to which it might have been subjected? 2. Was it the duty of the defendants to examine this axle by scraping off the dirt and minutely looking at it,—so minutely as to enable them to see the crack, and so to prevent or remedy the mischief? 3. If that was not their duty upon the first view of the truck, did it become their duty so to do when, upon having discovered the defect [i.e. in the spring and in the sole of the truck], they ordered it to be repaired, and it remained four or five days upon their premises for the purpose?

The jury answered the first question in the affirmative and the second in the negative; and to the third question they answered—"It was their duty to require from the waggon company some distinct assurance that it had been thoroughly examined and repaired."

The learned judge thought the last answer immaterial, and directed a verdict for the defendants, reserving leave to the plaintiff to move to enter a verdict for him for an agreed sum, if upon the facts and findings of the jury the Court should be of opinion that the defendants had been guilty of negligence:—

Held, that upon these findings the plaintiff was entitled to a verdict; for that, although it might not have been the duty of the defendants themselves to cause the truck to be properly examined and repaired upon its arrival at Peterborough junction, it was somebody's duty to do it, and the defendants were guilty of culpable negligence in not satisfying themselves that a proper examination had taken place before they allowed the truck to proceed.

Rule made absolute 1 C.P.D. 342.

THIS was an action against the Great Eastern Railway Company for negligence in allowing a defective truck to be used on their line, whereby the truck broke down, causing a collision with a passenger-train, in consequence of which the plaintiff was injured. Plea, not guilty.

The cause was tried before Kelly, C.B., at the spring assizes at Kingston, in 1874. The facts were as follows:—The plaintiff, a publican residing at Layton, in Essex, on the 11th of September, 1873, went from Bishopsgate station by the 10.40 train for Bishop Stortford. Shortly after the train left Sawbridgworth, the break-van of a mineral train which was on its way from Peterborough to London, consisting of twenty-five trucks laden with coal, fell against the carriage in which the plaintiff was sitting, and severely injured him. Some of the trucks composing the mineral train were the property of the Great Eastern Railway Company, and

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others (which had come by the Midland Railway, and had joined the train at Peterborough,) belonged to the Birmingham Waggon Company. The immediate apparent cause of the accident was the breaking of the leading axle of one of the last-mentioned trucks, which threw the break-van off the rails and against the passenger train. This truck with others had been hired by Messrs. Girling, coal-owners, from the Birmingham Waggon Company, who by the terms of the hiring were to keep them in repair. The proper time for the mineral train to leave the March station was 6.5 a.m.; but, in consequence of a Great Northern train being late on the morning in question, it did not leave that station until 8 o'clock. At the time of the accident the passenger train was going at the rate of from twenty-five to thirty miles an hour, and the mineral train at about twenty miles an hour. The disabled truck was found to have written upon it with chalk, "stop at Peterborough for repairs when empty." After the accident, it was found that the axle which gave way, and which was about $3\frac{1}{2}$ inches thick, had an old crack in it near the wheel, extending about an inch and a quarter through it. There was conflicting evidence as to whether or not this flaw could have been detected upon an examination of the truck: the plaintiff's witnesses stating that, though the axle was thickly incrusted with dirt, the fracture might have been discovered without much trouble; and the defendants' witnesses stating that it would be impracticable, seeing the large number of trucks coming on to their line from other railways (said to be between 20,000 and 30,000 weekly), to give each of them so minute an examination as would have been necessary to discover the defect, as it would virtually stop the traffic altogether.

It was proved that the ordinary life of an axle of this description was from twelve to fifteen years; but there was no evidence to shew how long this particular axle had been in use. It was further proved that the axle in question was a well-constructed one and of good material, having been made by the Patent Shaft and Axle Company, whose axles are in extensive use on nearly all the railways in the kingdom.

The course of business with respect to foreign trucks coming upon the defendants' line at Peterborough appeared to be this:— On their arrival there the tires of the wheels are tested with a

hammer, and the trucks looked round generally for defects. The truck in question was thus examined upon its arrival at Peterborough, by a person in the employ of the defendants, named Morecroft; and upon that examination it was found that the sole (the timber which supports the frame of the waggon, and to which the springs are fixed) on one side had a crack in it about five inches deep, which extended to about 2½ feet of its length, and that one of the springs had lost its camber, that is, was too much deflected. This spring was removed (by the Birmingham Waggon Company) and replaced by a new one, without however unloading the truck, which contained about seven tons of coal. Nothing was done to the sole, the crack in which it was not suggested had at all contributed to the accident. For this repair the truck was detained on a siding at Peterborough for four or five days. The direction to stop for repairs on the return of the truck empty was written upon it by Morecroft. Adams, the locomotive superintendent of the defendants, stated that the company had nothing to do with examining or repairing foreign trucks.

It was submitted on the part of the defendants that, if the defect in the axle was such as could not have been discovered upon the only examination which was practicable at Peterborough, they were not responsible.

The learned judge's report of the way in which the questions were left by him to the jury was as follows:—

"Upon the whole evidence, I thought the only question of fact was, whether the defect in the axle which caused the accident could have been discovered upon a minute and careful examination. If it could, the question arose whether it was the defendants' duty so to examine it: and I thought it was not, on the ground that it was sent forth upon its journey, loaded, by the Birmingham Waggon Company, and that when it came upon the defendants' railway at Peterborough it underwent a cursory external examination in order to ascertain whether it was in a condition to pursue its journey, but that to examine it carefully and minutely was substantially impracticable, seeing that 20,000 of these trucks per week came loaded and in transitu to Peterborough, and that so to examine each truck as to have enabled the examiner to discover a defect like this would have occupied such a length of time as

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would have stopped the traffic on the line. I, however, left the question of duty also to the jury; and I agree in the verdict they have found. *Redhead* v. *Midland Railway Co.* (1) and *Francis* v. *Cockrell* (2) were cited. The questions left to the jury were these,—

"1. Would the defect in the axle which was the cause of the accident have been discovered or discoverable upon any fit and careful examination of it to which it might have been subjected? Answer, Yes.

"2. Was it the duty of the defendants to examine this axle by scraping off the dirt, and minutely looking at it,—so minutely as to enable them to see the crack, and so to prevent or remedy the mischief? Answer, No.

"3. If that was not their duty upon the first view of the truck, did it become their duty so to do when, upon having discovered the defect [in the spring and in the sole of the truck?], they ordered it to be repaired, and it remained for four or five days upon their premises for that purpose. Answer, It was their duty to require from the Birmingham Waggon Company some distinct assurance that it had been thoroughly examined and repaired.

"I think the last answer immaterial; and I directed the jury to find a verdict for the defendants, reserving leave to move to enter a verdict for the plaintiff for 250*l.* agreed damages."

Watkin Williams, Q.C., in Easter Term last, obtained a rule nisi accordingly.

[BRETT, J. The contract of the company with the plaintiff was, to carry him with reasonable safety. When the examiner found that the truck required repair, and omitted to cause it to be repaired before they allowed it to proceed on its journey, it seems to me that there was negligence on their part.]

Parry, Serjt., *Marriott*, and *Hardy*, shewed cause. The accident happened from the breaking of an axle of a coal truck which was afterwards found to be cracked, and the sole question is whether the defendants through their servants were guilty of negligence in allowing the truck to travel upon their line with such a defect un-

(1) Law Rep. 2 Q. B. 412; in error, Law Rep. 4 Q. B. 387.

(2) Law Rep. 5 Q. B. 184; in error, Law Rep. 5 Q. B. 501.

discovered. It is to be borne in mind that the truck in question did not belong to the defendants, but to the Birmingham Waggon Company, from whom it had been hired by a firm of coal-dealers for the conveyance of coals to London,—coming on to the defendants' line from the Midland Railway at the junction at Peterborough, from which the defendants were bound by s. 92 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), to receive it. The truck was duly examined at Peterborough by those whose duty it was to examine it, viz. the servants of the Birmingham Waggon Company; and, although some other imperfections were found in it upon that examination, the defect which occasioned its subsequent failure was not discovered.

[LORD COLERIDGE, C.J. The real question is, whether the defendants performed their duty with reasonable diligence.]

The answer of the jury to the second question shews that they did. According to the judgment of Lord Westbury in the House of Lords in *Daniel* v. *Metropolitan Ry. Co.* (1), the defendants had a right to assume that what was done at Peterborough by the Birmingham Waggon Company was properly done, and was sufficient to insure the safety of the truck in question for the journey. His Lordship says: "As I took the opportunity of stating, in the course of the argument, to the counsel for the appellants, the ordinary business of life could not go on if we had not a right to rely upon things being properly done when we have committed and intrusted them to persons whose duty it is to do things of that nature, and who are selected for the purpose with prudence and care, as being experienced in the matter, and are held responsible for the execution of the work. Undoubtedly it would create confusion in all things if you were to say that the man who employs others for the execution of such a work, or the man who is a party to the employment, has no right to believe that the thing will be done carefully and well, having selected with all prudence proper persons to perform the work, but that he is still under an obligation to do that which to him in many cases would be impossible, viz. to interpose from time to time in order to ascertain that that was done correctly and properly the business of

(1) Law Rep. 5 H. L. 45, 61.

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doing which he had rightfully and properly committed to other persons."

Watkin Williams, Q.C., and *Biron*, in support of the rule. The answers of the jury to the first and third questions amount to a verdict for the plaintiff. It was the undisputed duty of the defendants, according to the case of *Redhead* v. *Midland Ry. Co.* (1), to use due care, skill, and foresight to insure the safe carriage of their passengers; and there is no difference in this respect between their own traffic and that which they receive from other lines. The negligence charged in this case is this, that, when the truck in question arrived at Peterborough and was found to require repair, it was not properly overhauled, but was allowed to proceed on its journey without a discovery being made of the defect in the axle which caused it to break down. The jury have found that that defect would have been discovered if the truck had been subjected to a careful examination before sending it on; and, if the defendants chose to be satisfied with the slight and imperfect examination made by the servants of the Birmingham Waggon Company, they must abide the consequences.

LORD COLERIDGE, C.J. This was a rule obtained by Mr. Watkin Williams, calling upon the defendants to shew cause why the verdict entered for them at the trial should not be set aside and a verdict entered for the plaintiff for 250*l.*, on the ground that upon the facts and findings of the jury the plaintiff is entitled to have it so entered. It is an action brought by the plaintiff against the defendants, a railway company, for alleged negligence in allowing a defective truck to be used upon their railway, which truck through the default of their servants broke down and caused injury to the plaintiff. The case comes before us upon the facts and upon the findings of the jury, which we must take to be correct, because the Lord Chief Baron, who tried the cause, reports himself to be satisfied with them. We are not, therefore, embarrassed by any complicated question as to what is the true result of the evidence. The short facts are these:—The Great Eastern Railway Company, like other companies incorporated for

(1) Law Rep. 2 Q. B. 412; in error, Law Rep. 4 Q. B. 397.

similar purposes, is bound under s. 92 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), to receive on its system of railways the engines and carriages of all companies and persons, upon payment of certain tolls. The truck in question did not belong to the defendants, but to Messrs. Girling under a contract of hiring with the Birmingham Waggon Company, who were bound to keep it in repair. It came on to the defendants' line at Peterborough junction, from the Midland Railway. It was there subjected to a cursory examination by one Morecroft, a person in the employ of the Birmingham Waggon Company. He found a patent defect in one of the springs. The truck was accordingly shunted to a siding, and the defective spring was replaced by a new one. Another patent defect was discovered, viz. a crack in the sole of the truck. Nothing was done to this. There was also a latent defect,—a crack in the fore axle; and it was admitted that this defect was the cause of the accident. The question is whether the company were guilty of neglect in not discovering it. Three questions were put to the jury,—first, "would the defect in the axle which was the cause of the accident have been discovered or discoverable upon any fit and careful examination of it to which it might have been subjected?"—secondly, "was it the duty of the defendants to examine this axle by scraping off the dirt and minutely looking at it,—so minutely as to enable them to see the crack, and so to prevent or remedy the mischief?" The jury answered the first of these questions in the affirmative and the second in the negative. At first sight, these answers would seem to be contradictory. But I think we may assume that the axle was not subjected to so minute an examination as it might and ought to have been subjected to. Putting the two together, it is clear that the jury thought that upon a proper and careful examination the defect in the axle would have been discovered. The evidence shewed that between 20,000 and 30,000 foreign trucks came weekly from other railways upon the defendants' line, and that to scrape off the dirt and minutely examine every axle would be utterly impracticable. It would be exaggerating the duty of railway companies, as laid down in *Redhead* v. *Midland Ry. Co.* (1),

(1) Law Rep. 2 Q. B. 412; in error, 4 Q. B. 397.

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to so extravagant an extent as would virtually stop the traffic. On the other hand, if it was not the duty of the defendants to make this examination, whose duty was it? If it was nobody's duty, that would disclose a most startling state of the law. But the answer to the third question, when minutely looked at, seems to me to relieve us from any such absurd conclusion. The third question was,—"If that," i. e. the minute examination of the axle after scraping off the dirt, "was not their duty upon the first view of the truck, did it become their duty so to do when, upon having discovered the defect, they ordered it to be repaired, and it remained for four or five days upon their premises for that purpose?" The answer to that question was, "It was their duty to require from the Birmingham Waggon Company some distinct assurance that it had been thoroughly examined and repaired." Speaking for myself, regard being had to the facts, I do not think the first two questions exhaust the whole matter; and I do not agree with the Lord Chief Baron that the answer to the third question was immaterial. On the contrary, I think it was most material. An examination was necessary. I do not say that it was necessary that this examination should be made by the defendants; but it is not unreasonable to say that it was their duty to be satisfied that it did take place. They receive upon their railway a truck with a patent defect. It was their duty, either by themselves or by others, to make such an examination as should have satisfied them that the truck when that defect was amended was in a fit condition to travel on their line. If the duty which the jury have negatived as to the company had been performed by the Birmingham Waggon Company, it would have prevented the mischief. A proper examination of the axle would have disclosed the defect in it. The railway company could not themselves make such an examination; but it was their duty to see that some one else did it. That is the fair result of the several seemingly contradictory findings of the jury. The company could not discharge themselves except by shewing that a careful and proper examination had been made by somebody. It is clearly no answer to say that this would have occasioned trouble or inconvenience or delay. When the truck was found to be in an unsound condition, it was the defend-

ants' duty to repair it properly themselves, or, at all events, to see that it was properly overhauled and repaired by the Birmingham Waggon Company, so that it might be sent on with a fair chance of surviving the journey. The substantial effect of the answers to the three questions, translated into common sense, and looked at by the light of the evidence and the summing-up, is this,—There ought to have been a careful examination of the truck at Peterborough: it may be that it was not the duty of the defendants to make that examination; but it was their duty, before allowing the truck to pass on, to satisfy themselves that such examination had taken place by those whose duty it was to make it. So interpreted, the answer to the third question becomes a material and a sensible answer. I do not base my judgment upon the general defective condition of the truck. The deflected spring and the cracked sole have by mutual concession been thrown out of consideration, as not having contributed to the accident. The ground upon which I proceed is, the defective state of the axle, and the absence of reasonable care on the part of the defendants to ascertain that the truck had undergone a proper examination before they allowed it to travel along their line. For these reasons, I am of opinion that the rule to enter a verdict for the plaintiff should be made absolute.

DENMAN, J. At the close of the argument for the defendants, I must admit I was left in some doubt as to whether the proper result would not have been to send this case down for a new trial. I clearly think that the entry of a verdict for the defendants upon the facts and findings of the jury was by no means satisfactory. After hearing the argument of Mr. Williams, a shade of doubt still remains upon my mind: but, upon the whole, I have come to the conclusion that we ought to make this rule absolute. The negligence on the part of the defendants which was relied on at the trial was, their not declining, after the Birmingham Waggon Company had expressed a desire to have the truck back for examination and repair when empty, to take the risk of sending it on. That point was fairly made at the trial. That being so, the finding of the jury is pertinent and intelligible.

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It is fairly certain that the jury did intend to find and did find negligence on a point made before them. My judgment is also influenced (but not so strongly) by the fact that the truck in question was obviously a damaged truck,—damaged as regarded the spring and the fissure or crack in the sole,—and that the persons who partially repaired it at Peterborough expressed a desire to have it back when empty, in order that it might be thoroughly overhauled. It is not to my mind unreasonable to say that this state of things called for the exercise of greater vigilance than ordinary on the part of the defendants. I cannot say that my mind is wholly free from doubt. But, upon the whole, I agree with my Lord that the jury did intend to rest their finding upon the fact relied on by Mr. Williams.

HUDDLESTON, J. I also think this rule should be made absolute. The findings of the jury upon the three points submitted to them seem to me to amount to this, that, although it was not the duty of the defendants themselves to examine the truck in question upon its arrival at their junction at Peterborough, it was the duty of some one to make the examination, and that the defendants were guilty of negligence inasmuch as they did not satisfy themselves by due inquiry that such examination had been made.

Rule absolute.

Attorneys for plaintiff: *Freeman & Bothomley, for Kelsey & Son, Salisbury.*

Attorney for defendants: *W. H. Shaw.*

WILBY *v.* ELGEE.

1875
April 15.

Married Woman—I. O. U. given after Husband's Death, for Money of Wife lent during his Life-time—Statute of Limitations—Consideration for fresh Promise—Forbearance to sue.

The plaintiff, a married woman, had lent the defendant 20*l.* (her own money) during her husband's life-time, for which the defendant, shortly after the husband's death, viz. on the 16th of July, 1867, gave the plaintiff an I.O.U. On the 12th of October, 1870, the defendant wrote to the plaintiff's agent,—"Yours of the 10th instant received, respecting Mrs. W.'s claim upon me. It is totally out of my power at the present time to liquidate the whole or even part of the same. I am in the anticipation of a better position, and, should I be successful, Mrs. W.'s claim shall have my first consideration. Meanwhile, I shall be pleased to pay a reasonable interest on the amount. Shew this letter to Mrs. W., and tell her the claim has not been forgotten by me, and shall be liquidated at the earliest opportunity possible:" and on the 6th of March, 1871, the defendant again wrote,—"At present it is utterly out of my power to do anything. I am willing to endeavour to pay it [the debt] off by easy instalments; or I am willing to pay you any reasonable interest to let the matter remain for the present," &c.

In an action for money lent, with a count upon a promise to pay in consideration of the plaintiff's forbearance to sue upon the I.O.U.:—

Held, that these letters amounted to a sufficient promise, founded upon a good consideration, to take the case out of the Statute of Limitations.

ACTION for money lent, interest, and money found due upon accounts stated. Pleas, never indebted, and the Statute of Limitations. Issue thereon.

The cause was tried before Brett, J., at the sittings at Guildhall after last Hilary Term. The plaintiff was the widow of a billiard marker residing at Ventnor, at which place the defendant was station-master. Her evidence was to the following effect:—During the life-time of her husband (who died on the 14th of July, 1867), she had lent various sums to the defendant, amounting in the whole to 20*l.* On the 16th of July she obtained from the defendant an I.O.U. for that sum, and, being indebted to one Alexander for the funeral expenses of her deceased husband, she handed the I. O. U. to him. On the 28th of September, 1870 (no previous application appearing to have been made to him on the subject), Alexander wrote to the defendant, as follows:—"I have to apply to you for the sum of 20*l.* upon your I.O.U. given to Mrs. Wilby, which she has handed to me as part payment of the funeral

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expenses of her late husband." On the 10th of October, Alexander again wrote to the defendant, threatening him with legal proceedings. This last letter produced from the defendant the following reply, dated the 12th of October:—

Yours of the 10th instant received, respecting Mrs. Wilby's claim upon me. It is totally out of my power at the present time to liquidate the whole or even part of the same: but, on the contrary, it would much alter my position, and possibly prove my ruin. I am in the anticipation of a better position, which your proceedings against me would entirely debar me from; and, should I be successful, Mrs. Wilby's claim shall have my first consideration. Meanwhile you, as a stranger to me, I shall be pleased to pay a reasonable interest on the amount. But do, I beg once more, not think of law, as it would entirely crush me. Please shew this letter to Mrs. Wilby, and tell her the claim has not been forgotten by me, and shall be liquidated at the earliest opportunity possible.

On the 6th of March, 1871, the defendant again wrote to Alexander:—

I can assure you at present it is utterly out of my power to do anything. I am willing to endeavour to pay it off by easy instalments. They must be small, as my salary is quite nominal: or, I am willing to pay you any reasonable interest to let the matter remain for the present. Let me beg of you to accept one of my propositions; for, I really cannot see you will do any good by issuing process, but, on the contrary, you may lose me my appointment, and the chance of payment then would be more remote.

The writ in this action was issued in 1874, and there was no evidence of any personal or other direct communication between the plaintiff and the defendant from the time of the alleged advances of the money till the day before the trial.

On the part of the defendant it was submitted that the debt, if any, was barred by the statute, and that the promise to Alexander did not revive it.

The learned judge gave the plaintiff leave to add a count upon a promise to pay in consideration of the plaintiff's forbearance to sue: and he told the jury that, if they believed that the plaintiff acted upon the defendant's letters to Alexander, and in consideration of those promises forebore to sue him, they should find for the plaintiff.

The jury accordingly found for the plaintiff, damages 23*l.*; leave being reserved to the defendant to move to enter a nonsuit if the Court should be of opinion that there was no evidence to go to the jury.

Bray, moved accordingly. There was no evidence to shew that the money lent was not the money of the husband: conse-

quently, upon his death, it would pass to his personal representatives. There was, therefore, no existing debt which could be the subject of forbearance as between the plaintiff and the defendant. "Forbearance, where originally there is no cause of action, is no consideration to raise an assumpsit:" *Loyd* v. *Lee.* (1) "Forbearance of suit against a defendant, where originally there was not any cause of action, and where the plaintiff must necessarily have failed, is not a consideration to support an assumpsit:" 1 Sel. N. P. 13th ed. 60, citing *Wade* v. *Simeon.* (2) Besides, the proposition contained in the defendant's letter of the 6th of March, 1871, consisted of two alternatives, neither of which was in terms accepted, and therefore there was no binding contract: *M'Iver* v. *Richardson* (3); *Mozley* v. *Tinkler.* (4) And, further, the promise here, if any, was made to Alexander, the holder of the I.O.U., and not to the plaintiff.

LORD COLERIDGE, C.J. I am of opinion that there is no ground for a rule in this case. The facts are shortly these:—A sum of 20*l.* was advanced by the plaintiff during the life-time of her husband to the defendant. After the death of the husband, an I. O. U. was given by the defendant to the wife, and she handed it to Alexander in payment of her husband's funeral expenses. The I. O. U. was never paid. The transaction took place long enough ago to bar the remedy on the I. O. U. Certain letters from the defendant to Alexander are relied on as promises for a fresh consideration to pay the debt. The material letters are those of the 12th of October, 1870, and the 6th of March, 1871. The letter of October, 1870, is in substance as follows:—"Yours of the 10th instant received, respecting Mrs. Wilby's claim upon me. It is totally out of my power at the present time to liquidate the whole or even part of the same. I am in the anticipation of a better position, and, should I be successful, Mrs. Wilby's claim shall have my first consideration. Meanwhile, I shall be pleased to pay a reasonable interest on the amount. Shew this letter to Mrs. Wilby, and tell her the claim,"—that is, her claim,—"has not been forgotten by me, and shall be liquidated at the earliest opportunity possible." It *may* be that that letter alone would not be

(1) 1 Str. 94.
(2) 2 C. B. 567.
(3) 1 M. & S. 557.
(4) 1 C. M. & R. 692.

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such a promise to pay in any event as would suffice to take the case out of the Statute of Limitations. But it at all events gets rid of one of the points made by Mr. Bray, that the defendant was dealing with Alexander alone. The whole tenor of the letter is inconsistent with that view. It is very good evidence to shew that the defendant perfectly well understood that he was dealing with Alexander as the agent of Mrs. Wilby. Then comes the letter of the 6th of March, 1871 :—"I can assure you at present it is utterly out of my power to do anything. I am willing to endeavour to pay it [the debt] off by easy instalments: or I am willing to pay you any reasonable interest to let the matter remain for the present," &c. This also shews that the defendant knew he was dealing with Alexander as the plaintiff's agent. The matter remained over until 1874, when the plaintiff sued upon that letter; and it appears to me that these letters, coupled with the plaintiff's forbearance to sue, amply support the plaintiff's claim in this action. Mr. Bray insists that, although that might be so if there was any original consideration or any existing debt; but that here there was no original debt, and no consideration for the fresh promise. I do not agree with him. The money was originally advanced out of moneys belonging to the wife. And, even if that had not been so, there is an I. O. U. given by the defendant, and upon a good consideration, after the death of the husband. There was, therefore, abundant evidence of a debt as between the plaintiff and the defendant. The I. O. U., although barred by the statute, was a claim which might be the subject of forbearance at the time the existence of the debt was acknowledged by the letter of the 6th of March, 1871. And, even if that were not so, the giving up of a doubtful claim has been held to be a sufficient consideration for a fresh promise. Upon each and all of the grounds, therefore, it seems to me that there was abundant evidence to warrant the jury in finding that there was a fresh promise, and that this rule should be refused.

DENMAN, J. I am of the same opinion. I think the letters of the 12th of October, 1870, and the 6th of March, 1871, taken together, amount to evidence of an agreement, that, in consideration of forbearance, the defendant would pay the 20*l.* and interest.

And I think the I. O. U. was, under the circumstances, ample consideration for that promise. The only point upon which I have entertained doubt is, as to whether this was an agreement with Alexander or with Mrs. Wilby, through Alexander as her agent. But, upon reading the letters carefully, I think they afford abundant evidence that the defendant knew he was dealing with Alexander as the agent of the plaintiff.

ARCHIBALD, J. I am of the same opinion. The verdict rests upon the count added by my Brother Brett at the trial, that the defendant promised to pay the I. O. U. with interest, in consideration of the plaintiff's forbearance to sue; and I think there was abundant evidence to support the action in that form. The I. O. U. was given for money advanced by the plaintiff in her husband's life-time, which money was her own; and it was given to her after her husband's death. The debt created by that I. O. U. being barred by the Statute of Limitations, an action could not have been maintained on the I. O. U. without some fresh promise. Now, I do not think the letter of the 12th of October, 1870, amounts to an *absolute* promise to pay; but the letter of the 6th of March, 1871, contains a distinct offer to pay the debt by instalments, or interest until payment. It has been objected that there was no formal acceptance of either one or other of these alternatives. Possibly that might have been a good objection if the action had rested upon the first alternative; but, there having been a forbearance to sue, that at all events is sufficient evidence of the second alternative having been accepted. The forbearance to enforce a doubtful claim has been held to be enough to support a promise to pay. But here I go further: I hold that the abstaining to sue upon the I. O. U. was a sufficient forbearance of a legal claim to give rise to a consideration for the fresh promise on the part of the defendant to pay the 20*l.* and interest. Looking at the two letters, I also think there was abundant evidence that the defendant knew he was dealing with Alexander as the plaintiff's agent. Upon the whole, therefore, I think the verdict was right.

BRETT, J., concurred.

Rule refused.

Attorneys for defendant: *Wood, Street, & Hayter.*

1875
April 23.

SHEPHEARD *v.* WHITAKER.

Libel—Innuendo—Arrest of Judgment—Damages.

1 QBD 45

In a periodical publication circulating amongst booksellers and stationers, the proprietor, by a mistake in the arrangement of the *London Gazette* announcements, inserted the names of the plaintiff's firm (who were stationers) under the head "First Meetings under the Bankruptcy Act," instead of under "Dissolutions of Partnerships."

In a count for libel, the innuendo was, "meaning thereby that the plaintiff had been bankrupt or had taken proceedings in liquidation or for composition." The jury having found the publication libellous, and having assessed the damages at 50*l.*:—

The Court refused to arrest the judgment or to interfere with the finding.

The declaration stated that the defendant falsely and maliciously printed and published in a certain newspaper called The Bookseller, the words following, that is to say:—"The Gazette. First meeting under the new Bankruptcy Act. Shepheard, Shepheard, and Yeomans, Garrick Street and Cheapside, under the firm of British and Foreign Stationery Company, stationers, printers, and booksellers, as regards Charles Yeomans,"—the defendant meaning thereby that the plaintiff's firm had been bankrupt, or had taken proceedings in liquidation or for composition, and that a first meeting of creditors under their bankruptcy or proceedings in liquidation or for composition was about to be held.

Plea, not guilty Issue thereon.

At the trial before Grove J., at the sittings in Middlesex after last term, it appeared that, through the negligence of the persons in the defendant's employ, instead of announcing in the extracts from the London Gazette inserted in their newspaper called The Bookseller, published on the 1st of January, 1875, that there had been a dissolution of the partnership of their firm, the advertisement announcing it was inserted amongst the first meetings under the Bankruptcy Act.

Upon the discovery of the mistake, the defendant, whose publication only appeared monthly, printed and circulated amongst the trade 4000 copies of the Booksellers' Circular explaining the blunder, and inserted an ample apology in his next issue, on the 1st of February, and also in the Stationers' Circular of the 5th.

Yeomans had brought a similar action, which was settled by a nominal verdict.

The learned judge left it to the jury to say whether or not the publication was libellous, telling them that at all events it was not a case for serious damages.

The jury returned a verdict for the plaintiff, damages 50*l*.

Weatherfield moved for a new trial on the grounds of misdirection and that the damages were excessive: he also moved to arrest the judgment, on the ground that the declaration disclosed no cause of action. He submitted that the form in which the announcement appeared was such that no person of ordinary intelligence could have been misled by it; that the learned judge ought not to have left the case to the jury; that, if anybody was likely to be affected by the publication, it was Yeomans only; and that, at all events, the damages were unjustifiably large.

LORD COLERIDGE, C.J. I am of opinion that there should be no rule. To entitle the defendant to complain of the declaration, he must shew that the words cannot possibly bear the sense imputed to them in the innuendo. I think the result suggested by it might and probably would follow from such a publication. A person reading the announcement might well suppose that the parties referred to had been bankrupt. With regard to the damages, I see no ground for saying that they are at all excessive or unreasonable.

BRETT, J. Whether a publication amounts to a libel or not is a question for the jury; and, as it is impossible for us to say that the words could not by possibility amount to a libel, the judgment cannot be arrested. The damages doubtless are somewhat high, seeing that no malice is suggested. But it is not surprising that a jury should give large damages where bankruptcy is imputed to a trader.

DENMAN and HUDDLESTON, JJ., concurred.

Rule refused.

Attorney for defendant: *G. M. Weatherfield.*

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April 26.

CORY AND OTHERS *v.* BRISTOW.

Poor-rate—Rateability of "Moorings in the River Thames"—Thames Conservancy Act, 1857 (20 & 21 *Vict. c. clxvii*), *s.* 91.

The plaintiffs were possessed of a floating derrick for unloading coals from colliers and reloading them into barges in the River Thames within the boundary of the parish of Greenwich, which derrick had been for several years moored or anchored at the same spot to moorings which had been placed by them in the bed of the river with the permission of the conservators under s. 91 of the Thames Conservancy Act, 1857, subject to the payment of a certain rent, and to removal at the will of the conservators.

These moorings consisted of two single-fluked anchors with iron stocks such as are only used for permanent moorings, which buried themselves by their own weight in the bed of the river, and two large fan-shaped screws screwed into the bed of the river to a depth of ten feet [or of two large stones sunk by dredging into the river's bed], to which anchors and screws [or stones] the derrick was fastened by means of chain-cables. The anchors and screws [or stones] formed permanent moorings, which it would be impossible for the derrick using them to weigh in the ordinary way:—

Held, that the plaintiffs were not liable to be rated or assessed to the relief of the poor of the parish in respect of these "moorings," inasmuch as they had not an exclusive occupation of any portion of the soil of the river, but merely a licence to attach their vessel to the moorings, at the pleasure of the conservators.

THIS was an action brought (in pursuance of 9 Geo. 4, c. 43, a local Act) against the defendant as clerk to the churchwardens, &c., of Greenwich, to recover 500*l.*, for damages sustained by the plaintiffs by the unlawful seizure and conversion by the churchwardens, &c., of a ship known by the name of the Atlas No. 2, and for money had and received by the churchwardens, &c., to the use of the plaintiffs.

The cause came on to be tried before Brett, J., at the sittings in Middlesex after Hilary Term, 1874, when a verdict was found for the plaintiffs for 145*l.*, subject to the opinion of the Court upon the following case:—

1. The plaintiffs are coal-merchants carrying on business in London.

2. The defendant is clerk to the churchwardens, overseers, and directors of the parish of Greenwich, and as such is liable to be sued for the acts of the churchwardens, &c., in pursuance of the above-mentioned statute.

3. On the 2nd of November, 1871, certain rates or assessments for the relief of the poor of Greenwich, and for other purposes, were made by the churchwardens, &c., in vestry assembled, under certain local Acts relating to Greenwich, viz. 4 Geo. 4, c. 70, and 9 Geo. 4, c. 43, and the said rates or assessments were afterwards allowed by two justices of the peace for the county of Kent, and notice of the same was duly given after the allowance of the same, in all respects in pursuance of those statutes.

4. In and by the said rates or assessments the plaintiffs were rated or assessed in the sum of 139*l.* as the occupiers of certain lands in the parish of Greenwich, to wit, moorings to which coal derricks, that is to say, Atlas No. 1 and Atlas No. 2, are moored to the bed of the River Thames. The following is a copy of the entries in the rate or assessment-book, so far as regards the poor-rate :—

Name of Occupier.	Description of Property rated.	Rateable Value.	First instalment, payable 6 Nov. 1871.	
		£ s. d.	£ s. d.	£ s. d.
William Cory & Son	Moorings to which coal derrick and apparatus, Atlas No. 1, are moored to bed of river . .	434 0 0	23 10 2	23 10 2
William Cory & Son	Moorings to which coal derrick and apparatus, Atlas No. 2, are moored to bed of river . .	400 0 0	21 13 4	21 13 4

The form of the other rates varies slightly from the above ; but the description of the property rated is identically the same.

5. The coal derricks are large floating hulks, and are respectively about 250 feet long and 90 feet wide. They are separately fitted up with the necessary machinery and apparatus for unloading coal from colliers and re-loading the same into vessels and barges brought alongside. No coals are deposited or stored in the derricks, nor does any one live or sleep thereon.

6. The derricks are the property of the plaintiffs, and ride afloat on the river Thames, within the boundary of the parish of Greenwich. They have been moored or anchored at the same place for some years, but daily change their position slightly with the ebb and flow of the tide.

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7. Atlas No. 1 was originally a vessel called a derrick built and constructed for the purpose of raising wrecks and sunken vessels, and anchored in the Thames, but not at the place where she now rides. She afterwards came into the possession of Messrs. Cory, the plaintiffs, when alterations were made in her to adapt her to her present use, and she was removed from her then to her present position.

8. The place where she was originally moored was about a quarter of a mile further up the river; and she was then kept in position by four anchors, two on the north and two on the south. In moving her from this position, where she had remained about three years, to her present one, the four anchors and the chain cables were removed with her; and two of them were put down again in mooring her at her present moorings.

9. The derrick Atlas No. 1 is now moored or retained at the spot where she floats in the following way, i.e. by two single-fluke anchors on the side nearest the shore, by two stones on the channel side, and by two stream anchors, one at her head and the other at her stern.

10. Prior to Atlas No. 1 taking up her position, the resolution next following was passed by the conservators of the river Thames, in whom, by virtue of the Thames Conservancy Acts, the soil and bed of the river Thames is vested; and the terms and conditions therein contained were assented and agreed to by the plaintiffs:—

Resolved,—That permission be given to Messrs. Cory & Son to lay down moorings (at which they may place derrick hulk) immediately opposite the sluice next eastward of Angerstein's Wharf, East Greenwich, and 510 feet from the river wall at the said sluice, as per plan; the work to be done to the satisfaction of the conservators of the river Thames and under the inspection of the harbour-master, and to remain on the following conditions being agreed to and observed by Messrs. Cory, viz. that the accommodation be assessed and the rent paid thereon; that the hulk be not used for the purpose of storing coals; that it be for the general use of the coal-trade, but the barges to or from the hulk be in all cases towed by a steam-tug to or from the Custom House, London; that all vessels leave the hulk immediately after being discharged, and that sailing colliers when discharged be towed away to such parts of the river as the harbour-master may direct; and in all other respects to be worked to the satisfaction of the conservators under the inspection of the harbour-master; and with the full understanding on the part of Messrs. Cory that, if at any time hereafter it shall be found by the conservators inexpedient to permit the moorings for the derrick-hulks to remain in that or any other part of the river, the conservators will,

under the powers vested in them by the 91st section of the Thames Conservancy Act, cause the same to be removed.

11. Instead of themselves laying down the moorings, as contemplated by the above resolution, the plaintiffs procured the necessary work to be done by the workmen of the conservators, and paid the conservators the whole of the costs and charges of the materials and labour expended on the same.

12. The moorings as actually laid down for Atlas No. 1, consist of four anchors and two stones. Of the anchors, the two mentioned in paragraph 8 are small and of little importance; and it was not contended on the part of the defendant that any liability to be rated in respect of the soil occupied by them attached to the plaintiffs. But the other two anchors are made with one fluke each, and are such as are never used as anchors on board ship, but are only used for permanent moorings. Anchors with one fluke could not be trusted to take the ground when dropped in the ordinary way. In laying down each of these anchors a hole was dredged out large enough to contain the whole of the anchor, and to a depth between seven and eight feet below the bed of the river. The anchor was then carefully laid in with the fluke downwards, and the hole was afterwards filled up to the level of the bed of the river with ballast which lies all round and over the anchor, through which ballast the chain cable is led up to the derrick.

13. The two stones are each of them about 7 feet long by 5 feet wide, and 3 feet thick. In order to put each of these stones in their places, a hole was dredged out large enough to contain the stone, and about seven feet deep. The stone was then let down into the hole, and the hole then filled up to the level of the bed of the river with ballast. There is about four feet thickness of ballast on each stone, and about 70 tons of ballast are used in each hole. A chain cable is led up through the ballast to the derrick.

The moorings formed by these two anchors and stones are as firm moorings as it is possible to place in the river. It is quite impossible that the derrick using them can weigh them in the ordinary way in which ships weigh anchor. If the derrick had to be moved, it could only be by casting off the cables, and leaving the anchors and stones behind.

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14, 15. Atlas No. 2 was built at Jarrow on the Tyne, and towed thence by steamer to her present position. Prior to her taking up her berth, an arrangement was entered into by the plaintiffs with the conservators in terms similar to that with respect to Atlas No. 1, as mentioned in paragraph 10.

16. The material portion of the moorings of Atlas No. 2 consists of two anchors similar to the anchors mentioned in paragraph 12, but having iron instead of wooden stocks, which bury themselves by their own weight in the bed of the river, so that it was not necessary to dredge holes to receive them. But, instead of the stones used for Atlas No. 1, two large fan-shaped screws have been used. These are screwed into the bed of the river, to a depth of 10 feet. These screws, together with the two single-fluke anchors form moorings as permanent as those used for Atlas No. 1; and it would be equally impossible for the derrick using them to weigh them in the ordinary way.

17. The rent paid by the plaintiffs is 600*l.* per annum for the moorings of Atlas No. 1, and 650*l.* for the moorings of Atlas No. 2.

18. The plaintiffs, under the circumstances above stated, denied that they were the occupiers of land in the parish of Greenwich, and denied that they were liable as such to be rated or assessed to the relief of the poor of the parish, and therefore refused to pay the 139*l.* at which they were rated and assessed as aforesaid, or any part thereof.

19. The churchwardens, &c., thereupon caused the plaintiffs to be summoned before the magistrate sitting at the police-court at Greenwich, to shew cause why they (the plaintiffs) refused to pay the sum assessed for and in respect of a house, building, land, tenement, and hereditament; and such proceedings were thereupon had that the magistrate issued a warrant of distress for the levy of the said sum of 139*l.* upon the goods and chattels of the plaintiffs; and the churchwardens, &c., thereupon, in pursuance of the said warrant, caused the derrick Atlas No. 2 to be seized and taken as and for the distress in the warrant mentioned.

20. The plaintiffs thereupon, in order to free the derrick from such seizure, paid under protest to the churchwardens, &c., the said sum of 139*l.*, together with 7*l.* 9*s.* for costs, amounting in the whole to 146*l.* 9*s.*, and brought this action to recover damages for

the seizure, which they allege to be illegal, and also to recover the money so paid by them under protest.

21. It was agreed that the pleadings should form part of the case, and that no objection should be taken to such pleadings; also that the statute 20 & 21 Vict. c. cxlvii. (the Thames Conservancy Act) should form part of the case.

The question for the opinion of the Court was, whether the plaintiffs were occupiers of land in the parish of Greenwich, and liable as such to be rated or assessed to the relief of the poor of the parish.

Patchett, for the plaintiffs. The facts of the present case are not so different from those of *Cory* v. *Churchwardens of Greenwich* (1) as substantially to vary the question; the only difference being that on that occasion the anchors and stones were dropped into the bed of the river by the derrick itself, whereas here they were placed there by other means, and were sunk a little deeper. The plaintiffs in fact are merely anchoring their vessel in a navigable river where the law allows them to anchor, subject only to the powers and authorities given to the conservators of the river. The plaintiffs have done this with the permission of the conservators. The resolution set out in paragraph 10 of the case amounts to a licence only. The plaintiffs do not occupy any land under it. Indeed, the conservators have no power to demise any part of the soil of the river, under 20 & 21 Vict. c. cxlvii. In *Watkins* v. *Overseers of Milton-next-Gravesend* (2), a document like this was held to operate as a licence only, and not as a demise. In *Grant* v. *Oxford Local Board* (3), the University Boat Club was held not to be rateable in respect of an occupation of moorings not substantially differing from these. Cockburn, C.J., there says that "exclusive occupation must necessarily be the foundation of rateability." To render the plaintiffs rateable here, there must be a parting by the conservators with the exclusive possession of the soil to them: *Allan* v. *Overseers of Liverpool.* (4) And see *Reg.* v. *Abney Park Cemetery Co.* (5); *London and North Western Ry. Co.* v. *Buckmaster.* (6)

(1) Law Rep. 7. C. P. 499.
(2) Law Rep. 3 Q. B. 350.
(3) Law Rep. 4 Q. B. 9.
(4) Law Rep. 9 Q. B. 180.
(5) Law Rep. 8 Q. B. 515.
(6) Law Rep. 10 Q. B. 70.

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Barrow, contrà. In *Cory* v. *Overseers of Greenwich* (1), the moorings were dropped by the derrick as an ordinary anchor might be. That was the very foundation of the judgment of Willes, J., and the ground upon which that learned judge distinguished that case from *Forrest* v. *Overseers of Greenwich*. (2) The moorings in *Watkins* v. *Overseers of Milton-next-Gravesend* (3), as to permanence and fixity, are substantially the same as here; and Blackburn, J., says (4): "I think these moorings are so attached to this part of the soil of the river, that, if the appellant was the occupier of the moorings, he would be occupier of the soil." There, the moorings were placed in the bed of the river by the conservators; here, by the plaintiffs themselves under the licence of the conservators. In *Forrest* v. *Overseers of Greenwich* (2), Lord Campbell, C.J., says (5): "Had the pier always rested on the ground, no question could have been raised as to its rateability. At low water it does rest on blocks fixed on the bed of the river for that purpose. At other times it floats; but at all times it is kept in its place by iron chain cables fastened to iron anchors placed in the bed of the river, and by an iron chain attached to an iron staple fixed in the stone stairs which constitute the landing place. There it has remained for fourteen years; and there only can it be used for the purpose to which it is to be applied. It therefore has a locality; and the appellants are the occupiers of land by the use which they make of the blocks, of the stairs for holding the staples, and of the iron anchors permanently placed in the bed of the river. These anchors cannot properly be likened to the anchors of ships dropped for a temporary purpose." It is impossible to discover any difference between the chains and anchors there and the chains, anchors, and stones here. If these moorings had been laid down by the conservators themselves, the cases of *Allan* v. *Overseers of Liverpool* (6) and *London and North Western Ry. Co.* v. *Buckmaster* (7) might have had some application. But here the plaintiffs have not a mere licence to use moorings, but permission from the conservators to

(1) Law Rep. 7 C. P. 499.
(2) 8 E. & B. 890; 27 L. J. (M.C.) 96.
(3) Law Rep. 3 Q. B. 350.
(4) At p. 355.
(5) 8 E. & B., at p. 899.
(6) Law Rep. 9 Q. B. 180.
(7) Law Rep. 10 Q. B. 70.

lay them down themselves. They have therefore such a possession as would enable them to maintain trespass against any person who interfered with them. Even if the plaintiffs had been wrong-doers in placing the moorings in the bed of the river, they still might have been rateable in respect of them: per Lord Campbell in *Forrest* v. *Overseers of Greenwich.* (1) A de facto occupation under a mere licence may render the occupier liable to be rated. [*Kittow* v. *Liskeard Union Assessment Committee.* (2) *Chelsea Waterworks Company* v. *Bowley* (3) and *Smith* v. *St. Michael, Cambridge* (4), were also referred to.]

Patchett was not called upon to reply.

LORD COLERIDGE, C.J. I am of opinion that our judgment in this case should be for the plaintiffs. The action is brought to recover damages for an alleged unlawful seizure by the defendant as clerk to the churchwardens, &c., of Greenwich, of a derrick belonging to the plaintiffs, for non-payment of a poor-rate. The question in the action is whether or not the rate was properly assessed upon the plaintiffs as occupiers in respect of the subject-matter of the rate. It appears that the plaintiffs are the proprietors of certain derricks for the mooring of which certain moorings were under an arrangement with the conservators laid down in the bed of the Thames within the boundary of the parish of Greenwich, and that they are assessed to the poor-rate in respect thereof. Now, it will be necessary to consider,—first, whether these moorings were a proper subject-matter of rating,—secondly, whether these plaintiffs had such an occupation of the subject-matter as to make them liable to be rated. The description of the moorings in the case is as follows:—"The derrick is moored or retained at the spot where she floats, in the following way, i. e. by two single-fluke anchors on the side nearest the shore, by two stones on the channel side, and by two stream-anchors, one at her head, and the other at her stern." Further on it is said: "The moorings consist of four anchors and two stones. Of the anchors, the two named in an earlier paragraph are small and of little importance. The other two anchors are made with only one fluke

(1) 8 E. & B. at p. 897.
(2) 44 L. J. (M.C.) 23.
(3) 17 Q. B. 358.
(4) 3 E. & E. 383.

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each, and are such as are never used as anchors on board ship, but are only used for permanent moorings. Anchors with one fluke could not be trusted to take the ground when dropped in the ordinary way. In laying down each of these anchors, a hole was dredged out large enough to contain the whole of the anchor, and to a depth between 7 and 8 feet below the bed of the river. The anchor was then carefully laid on with the fluke downwards, and the hole was afterwards filled up to the level of the bed of the river with ballast which lies all round and over the anchor, through which ballast the chain cable is led up to the derrick. The two stones used are each of them about 7 feet long by 5 feet wide and 3 feet thick. In order to put each of these in their places, a hole was dredged out large enough to contain the stone, and about 7 feet deep. The stone was then let down into the hole, and the hole filled up to the level of the bed of the river with ballast. There is about 4 feet thickness of ballast on each stone, and a chain cable is led up through the ballast to the derrick. The moorings formed by these two anchors and stones are as firm moorings as it is possible to place in the river: and it is quite impossible that the derrick using them can weigh them in the ordinary way in which ships weigh anchor." The first contention on the part of the plaintiffs was, that there was no such exclusive occupation by them as to render them liable to be rated, and reliance was placed upon the case of *Cory* v. *Churchwardens of Greenwich* (1) as a decision substantially in point between these parties. I am of opinion, however, that that case is not in point. That which was done there was very different from what has been done here. The judgment of Willes, J., shews that the ground of the decision there was that the moorings were not things that could be occupied,—that they were in no sense things that were capable of being occupied. The inclination of my mind is that the moorings described in this case would be rateable in some person. The judgment of Blackburn, J., in *Watkins* v. *Milton-next-Gravesend* (2), and the acceptance of that judgment by Willes, J., in *Cory* v. *Churchwardens of Greenwich* (1), tend to shew that these moorings would in the hands of some person be properly the subject-matter of a rate. But the question for us is whether this

(1) Law Rep. 7 C. P. 499. (2) Law Rep. 3. Q. B. 350.

rate was properly assessed upon the plaintiffs. In order to establish that, it was incumbent on Mr. Barrow to make out not only that these moorings might be the subject-matter of a rate, but also that the plaintiffs were the proper persons to be assessed thereto. The property rateable to the relief of the poor is well described by Blackburn, J., in *Watkins* v. *Milton-next-Gravesend.* (1) "The real question," he says, "is, whether the appellant is the occupier of part of the bed of the river Thames, so as to be rateable for the value of the land in the river, the value of the land being enhanced by the fact that the *Black Prince* hulk is moored to that portion of the land. It appears that the conservators of the Thames made moorings in the Thames expressly for the purpose of enabling the hulk to be attached to them, and that these moorings are fixed to the bed of the river; and there can be no doubt that they do occupy part of the soil. They are described as being 'two large iron fan-shaped screws secured to the soil,' and are connected together by means of two chains. I think these moorings are so attached to this part of the soil of the river that, if the appellant was the occupier of the moorings, he would be occupier of the soil. Then comes the question, is he the occupier of these moorings? The conservators of the Thames are the owners of the soil, and are the owners of the moorings also, and they might have demised them to the appellant for the mooring of barges; and, if they had demised them, the appellant would then have been occupier of the land. There is no doubt that the conservators might retain the possession in themselves, so as to be the occupiers; and for a sum of money, or gratuitously if they pleased, grant to another person the privilege or easement of attaching his barges to these moorings; in which case the conservators would themselves still continue to be the occupiers; and, unless there be something in their Act to relieve them from being rated, they would be rateable, the value of their occupation being measured by the amount paid to them for their licence." And the learned judge came to the conclusion that the appellant was not the occupier, but was merely a person having a licence to use the moorings. I find that test also applied by the Court of Queen's Bench in *London and North Western Ry. Co.* v.

(1) Law Rep. 3 Q. B. 350. at 355.

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Buckmaster (1), and also in some interlocutory observations of Lord Campbell in *Forrest* v. *Overseers of Greenwich.* (2) Was there such an occupation here? I agree that we cannot go into the question of the title of the occupier. If the conservators of the Thames, in violation of their duty, thought fit to grant the exclusive occupation of a portion of the soil of the river to an individual, the occupier would be rateable in respect of such occupation. A tort-feasor may have such an occupation as would be the subject of a rate; for, as Lord Campbell says in *Forrest* v. *Overseers of Greenwich* (3), "a party could hardly be permitted to say that he was a trespasser, and therefore not rateable." I quite agree, therefore, that the question is not whether the conservators had a right to grant exclusive possession of the soil of the river, but whether they did so. That is only important in putting a construction upon the resolution under which the moorings were placed. It is clear from the Act that the conservators had no right to grant the exclusive possession or occupation of any part of the soil of the river to any one. There is not a trace of any power to part with their right to deal with the soil of the river for the public good. The resolution does not profess to do so. It gives the plaintiffs permission to lay down moorings at a spot indicated, which are to remain subject to the express condition that, "if any time hereafter it shall be found by the conservators inexpedient to permit the moorings to remain in that or any other part of the river, the conservators will, under the powers vested in them by the 91st section of the Thames Conservancy Act, cause the same to be removed." Now, s. 91 is as follows:—"No mooring chains shall be put down or placed in any part of the river without the permission of the conservators previously obtained, and every such mooring chain which shall be put down or placed shall be so continued only during the pleasure of the conservators; and the conservators may at any time, by giving one week's notice in writing, require such mooring chains to be removed; and, in case default shall be made in such removal beyond the time to be mentioned in such notice, such mooring chains may be treated by the conservators as a nuisance, and removed accordingly." The conservators could not, and do not

(1) Law Rep. 10 Q. B. 74. (2) 8 E. & B. 890; 27 L. J. (M.C.) 96.
(3) 8 E. & B. at p. 897.

by that resolution profess to grant to the plaintiffs the exclusive occupation of so much of the bed of the river as is occupied by these moorings; and the words of the resolution are abundantly satisfied by holding it to be a mere licence to place and to use the moorings during the pleasure of the conservators. It is said that there is a distinction between the moorings in *Watkins* v. *Milton-next-Gravesend* (1) and those in the present case, to this extent, that there the conservators themselves put down the moorings, whereas here they were put down by the plaintiffs; that is, that, though the workmen of the conservators were employed to do the work, the plaintiffs paid for it. It may be that this stipulation was introduced into the resolution in order to get rid of the effect of the strong expressions of opinion of Blackburn, J., in that case. But that is not for us to decide to-day. If we are right in construing the resolution in this case to be a mere licence revocable at the pleasure of the conservators, the plaintiffs have not such an exclusive occupation of a rateable subject as to render them, within any of the decided cases, liable to be assessed to the relief of the poor. For these reasons, I am of opinion that our judgment ought to be for the plaintiffs.

BRETT, J. The question we are called upon to answer is, whether, upon the facts stated in this case, the plaintiffs were occupiers of land in the parish of Greenwich, and liable as such to be rated or assessed to the relief of the poor of the parish? That depends upon two questions, both of which have been discussed before us,—1. Whether a particular spot of the bed of the river has been dealt with so as to make some one liable to be rated in respect of it,—2. Whether the plaintiffs are the proper persons to be rated. Mr. Patchett contends that the question is decided by the case of *Cory* v. *Overseers of Greenwich*. (2) It seems to me, however, that neither point was decided by that case. All that was decided there was, that, under the particular circumstances of that case, no part of the bed of the river had been so dealt with as to render any person liable to be rated in respect of it. The opinion of the Court being that the mooring of the derrick was a mere mode of anchoring her, it became immaterial to consider

(1) Law Rep. 3 Q. B. 350. (2) Law Rep. 7 C. P. 499.

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whether or not the plaintiffs were liable to be rated. That case, therefore, does not decide the matter. Mr. Barrow, on the other hand, relied upon *Watkins* v. *Milton-next-Gravesend* (1) in support of the first point, because Blackburn, J., expressing a strong opinion that a mode of mooring substantially like that described here would render some one liable to be rated. I incline to agree with him that the moorings in that case were substantially like those described here. My Brother Blackburn seems to have been rather impressed with the notion that the conservators would be liable. They are in the possession and occupation of the soil of the bed of the river. If they leave it intact, they clearly are not rateable in respect of it. But, if they grant to an individual the exclusive occupation of a portion of the bed of the river, or even an easement only, so as to make it valuable in their hands, it may be that the conservators are rateable in respect thereof. I say we are not called upon to decide whether any one ought to be made rateable in respect of the grant of such exclusive occupation. Mr. Patchett says that the conservators could not make a grant of the exclusive occupation of the soil of the river. I cannot agree with him. If they did grant an exclusive occupation, then, as long as the grantees retained such exclusive occupation, I think they would be liable. In *Forrest* v. *Overseers of Greenwich* (2) it was not material to inquire if the Waterman's Company had a legal right to the exclusive occupation of any part of the soil. It did not signify whether the conservators had or had not power to grant such exclusive occupation; for, if the erection in question was fixed or placed in the river without the leave of the conservators, even though the appellants were wrong-doers, they might still be liable to be assessed so long as they continued to occupy. Then comes the question whether the plaintiffs in this case are to be treated in the same way. It is clear from the cases that, to make a party rateable, he must have the exclusive occupation of some part of the soil. One who has a mere easement or licence from the owner has not that exclusive occupation which will render him liable to be rated. We have, therefore, to consider whether the resolution set out in the case amounts to a grant of the exclusive occupation of part of the bed

(1) Law Rep. 3 Q. B. 350. (2) 8 E. & B. 890; 27 L. J. (M.C.) 96.

or soil of the river, or is a mere licence. When we come to consider it, it seems to me that all the reasoning of Blackburn, J., in *Watkins* v. *Milton-next-Gravesend* (1) is opposed to Mr. Barrow's argument. Considering this document by the light of those observations, and seeing the duty which is imposed by the Act of Parliament upon the conservators, viz. to retain in their hands the absolute power and control over every part of the river, notwithstanding the word "rent" is used, we must hold it to be a grant of a licence or "accommodation" only, and not as a demise or an agreement which was intended to pass the exclusive possession or occupation to the plaintiffs. This view is strengthened by the reservation of power to the conservators to remove the moorings at any time at their pleasure without having recourse to any legal proceedings. Under these circumstances, the plaintiffs were clearly not rateable, and our judgment must be in their favor.

DENMAN, J. The question submitted to us is, whether the plaintiffs were occupiers of land in the parish and liable as such to be rated to the relief of the poor. That question divides itself into two branches,—first, whether the plaintiffs were exclusive occupiers of any part of the bed of the river,—secondly, if occupiers, were they occupiers of land for which they were liable to be rated? Upon the last point, I am inclined to think that there was an occupation of land by the plaintiffs which might be the object of a rating, if any right to the occupation had been conferred upon them by the conservators. But it is not necessary to express any decided opinion upon that on the present occasion. I quite agree that the case of *Cory* v. *Overseers of Greenwich* (2) does not decide this matter: the description of the thing occupied in the two cases is essentially different. In determining the question now before us, we must look to the nature of the alleged occupation. That turns upon the construction of the resolution of the conservancy board under which these moorings were laid down. It professes to give the plaintiffs permission to place the moorings in the bed of the river upon certain conditions, and subject to the right of the conservators to remove them at their pleasure on giving a certain notice, under s. 91 of the Thames Conservancy Act, 1857. It

(1) Law Rep. 3 Q. B. 350. (2) Law Rep. 7 C. P. 499.

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occurred to me at one time that the provision for notice would seem to give the plaintiffs a sort of interest in the land. But I find that, in *Watkins* v. *Milton-next-Gravesend* (1), a month's notice was stipulated for, and yet it was held that no interest in the land was granted. That case, therefore, does not prevent our holding this to be a mere licence or easement, and not a contract for an exclusive occupation of the land. I think the plaintiffs were not liable to be rated.

Judgment for the plaintiffs.

Attorney for plaintiffs: *Mark Shephard.*
Attorney for defendant: *W. Bristow.*

April 15.

WALSH *v.* THE BISHOP OF LINCOLN.

Quare Impedit—Estate for Life in an Advowson—Next Presentation—Right of Patron to present Himself—Simoniacal Contract within 12 *Anne, st.* 2, *c.* 12, *s.* 2.

10 QBD 46.

The purchase of an "estate for life in an advowson" is not the purchase of a "next presentation" or "next avoidance," within the meaning of 12 Anne, st. 2, c. 12, s. 2, though there be only *one* avoidance during the life-time of the cestui que vie,—the statute applying only to chattel interests.

In quare impedit the declaration stated that S., being seised for life of an advowson, conveyed it to the plaintiff by deed for his life, for 3000*l.*; that, during the life of S., the incumbent died, whereby it belonged to the plaintiff to present a fit clerk, but the defendant, the bishop, hindered him.

First plea,—that, the church being so vacant, and the plaintiff being so seised, the plaintiff presented himself for admission; that the vacancy caused by the death of the former incumbent was the next and only avoidance of the church which accrued to the plaintiff after his purchase of the advowson for the term aforesaid; and that such presentation of himself by the plaintiff was void by 12 Anne, st. 2, c. 12, s. 2:—

Held, that the plea was bad, the purchase of the life-estate of S. being a purchase of an "advowson," and not of a "next presentation," and therefore not a simoniacal contract within that statute.

Second plea,—that, the church being vacant, the plaintiff offered himself to the defendant as ordinary for admission, and prayed the defendant as such ordinary to admit and institute him thereto, which the defendant refused, as he lawfully might, but was ready to admit and institute a fit clerk, other than the plaintiff himself, upon the presentation of the plaintiff:—

Held, that the plea was bad, inasmuch as, by the common law, a clerk who is

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(1) Law Rep. 3 Q. B. 350.

seised of a freehold estate in an advowson may, upon a vacancy, offer himself to the bishop and pray to be admitted, and the bishop has no absolute discretion to admit or to reject him.

Semble, that the plea should have shewn the grounds of the bishop's refusal to present the plaintiff.

THE declaration stated that, on the 1st of January, 1820, Sir Richard Sutton was seised as of fee tail of and in the manor of Great Coates, in the county of Lincoln, and the advowson of the rectory of the parish church of Great Coates thereto belonging; that afterwards, to wit, on the 1st of February, 1820, by an indenture of bargain and sale then made between Sir R. Sutton and Dame Mary Elizabeth his wife of the first part, W. Bainbrigge of the second part, A. H. Macdougall of the third part, F. Chaplin and T. B. Western of the fourth part, and W. F. Burton of the fifth part, and afterwards inrolled in Chancery, the said Sir R. Sutton, for the purpose of barring the estate-tail of him Sir R. Sutton therein, granted, bargained, sold, and confirmed unto the said W. Bainbrigge, his heirs and assigns, certain manors, advowsons, and other hereditaments in the county of Lincoln, including the manor and advowson of Great Coates, to hold the same unto and to the use of W. Bainbrigge, his heirs and assigns, to the intent that the said W. Bainbrigge might become perfect tenant of the freehold, in order that common recoveries might be suffered wherein the said A. H. Macdougall should be demandant, the said W. Bainbrigge tenant, and the said Sir R. Sutton vouchee, who should vouch over the common vouchee; that, in the said indenture was a declaration that the said recoveries should enure to the use of Sir R. Sutton and his assigns for the term of his life, and, subject thereto, to the use of the first son of the body of Sir R. Sutton on the body of the said Dame Mary Elizabeth his wife to be begotten and the heirs male of the body of such first son issuing, and, subject thereto, to certain other uses therein mentioned; that afterwards, to wit, in Hilary Term, 1820, a common recovery in due form of law was accordingly suffered of the said manors, advowsons, and hereditaments (including the said manor and advowson of Great Coates), in pursuance of the said indenture, wherein the said parties were so respectively demandant, tenant, and vouchee as aforesaid, and the said vouchee vouched

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over the common vouchee, and a writ of seisin was thereupon awarded to the said A. H. Macdougall, prout patet &c., and thereby and by force thereof, and of the said indenture, and of the statutes for transferring uses into possession, Sir R. Sutton became and was seised for the term of his natural life of the manor of Great Coates, in the county of Lincoln, with its appurtenances, and of the advowson of the rectory of the parish church of Great Coates; that, being so seised thereof, he afterwards, to wit, on the 4th of December, 1820, presented to the said church, being then vacant, one Henry Houson the younger, his clerk, who on the presentation of the said Sir R. Sutton was admitted, instituted, and inducted into the same, in the time of peace, in the time of our sovereign lord George the Fourth, King of Great Britain: that afterwards, to wit, on the 17th of December, 1844, by an indenture then made between the said Sir R. Sutton of the first part, John Sutton, therein described as being and who then was the first and eldest son of the said Sir R. Sutton, by Dame Mary Elizabeth Sutton, his late wife, then deceased, of the second part, and the Rev. J. B. Wright and J. T. Pratt of the third part, the said Sir R. Sutton and the said John Sutton, for the purpose of barring and destroying the estate-tail of the said John Sutton therein, did grant, bargain, sell, release, and confirm unto J. B. Wright and J. T. Pratt, their heirs and assigns (amongst other lands and hereditaments), the said advowson of the rectory of the parish church of Great Coates, to hold the same, freed from such estate-tail, to the use of Sir Richard Sutton and his assigns during his life, and, subject thereto, to the use of John Sutton and his assigns during his life, with certain remainders in the said indenture mentioned; whereby the said Sir R. Sutton became seised of the said manor and advowson for the term of his natural life, and, subject thereto, the said John Sutton became entitled to the same for the term of his natural life: that afterwards, and on the 14th of November, 1855, the said Sir R. Sutton died so seised as aforesaid, upon whose death the said manor and advowson vested in the said John Sutton (who then became Sir John Sutton, Bart.), and he became and was seised thereof for an estate in possession for the term of his natural life; and, being so seised thereof for life as aforesaid, he, the said Sir John Sutton, by an indenture dated the

21st of December, 1859, and then made between the said Sir John Sutton of the one part and the plaintiff of the other part, for the consideration of 3000*l.* paid by the plaintiff, granted and confirmed to the plaintiff and his assigns the advowson of the rectory of the church aforesaid, and the right of patronage and presentation thereto, during the life of the said Sir John Sutton; by virtue whereof the plaintiff became and was seised of the said advowson as in gross by itself, as of right, for the term of the natural life of the said Sir John Sutton; and, the plaintiff being so seised thereof, the said church afterwards and during the continuance of the natural life of the said Sir John Sutton, to wit, on the 30th of May, 1873, became vacant by the death of the said H. Houson, whereby it then and there belonged and still belongs to the plaintiff to present or otherwise legally require institution for a fit clerk to the said church, being so vacant as aforesaid; but the defendant, the said bishop, would not present him, but unjustly hindered him; wherefore the plaintiff said that he was injured and had sustained damage to the value of 10,000*l.*, and therefore he brought suit &c.

First plea,—That the said church in the declaration mentioned is within the defendant's diocese of Lincoln, and is a benefice with cure of souls, and that he the defendant hath not and doth not claim to have anything in the said church except the admission, institution, and induction of parsons to the said church, and such other things as belong to the ordinary of the place as ordinary: that the plaintiff purchased, at the date and for the consideration in the declaration stated, the advowson of the rectory of the said church and the right of patronage and presentation thereto during the life of Sir John Sutton as in the declaration stated, and was seised of the said advowson for the term of the natural life of the said Sir John Sutton as in the declaration stated, and did not purchase nor was seised of the said advowson for any other or greater estate; and that, the said church having become vacant by the death of H. Houson as in the declaration stated, afterwards, and whilst the same continued vacant, the plaintiff, being so seised as aforesaid, to wit, on the 12th of November, 1873, by a writing under his hand bearing date, to wit, the day and year last aforesaid, presented himself to the defendant, as being such ordinary as

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aforesaid, for admission to the said church, and requested the defendant as such ordinary to admit, institute, and induct him to the said church: that the vacancy caused by the death of the said H. Houson was the next and only avoidance of the said church which happened or accrued to the plaintiff after his purchase of the said advowson for the term aforesaid, and that Sir John Sutton died on the 5th of June, 1873: that, by virtue of an Act made and passed in the 13th year of the reign of Queen Anne, c. 11 (1), intituled "An Act for the better maintenance of curates within the Church of England, and for preventing any such persons from buying the next avoidance of any church preferment," such presentation of himself by the plaintiff as aforesaid became and was utterly void, frustrate, and of no effect in law, and any admission or institution of the plaintiff thereon would have been utterly void, frustrate, and of no effect in law, and the defendant by reason thereof could not admit and institute the plaintiff to the said church by virtue of his presentation of himself as aforesaid, and refused to admit and institute the plaintiff thereto; and that the hindrance of the plaintiff's right in the declaration stated is the said refusal of the defendant, and no other.

Second plea,—that the church in the declaration mentioned is within the defendant's diocese of Lincoln, and that he hath not and doth not claim to have anything in the said church except the admission, institution, and induction of parsons to the said church, and such other things as belong to the ordinary of the place as ordinary: that, the said church having become vacant by the death of Houson on the 30th of May, 1873, as in the declaration stated, afterwards, and whilst the same continued vacant, the plaintiff, being seised of the advowson of the rectory of the church aforesaid and the right of patronage and presentation thereto as in the declaration stated, to wit, on the 12th of November, 1873, by a writing bearing date, to wit, the day and year last aforesaid, and signed by the plaintiff and delivered to the defendant, offered himself to the defendant, as being such ordinary as aforesaid, for admission to the said church, and prayed the defendant, as being such ordinary as aforesaid, for admission to the said church, and prayed the defendant as such ordinary to admit and institute him thereto:

(1) 12 Anne, stat. 2, c. 12.

that the defendant afterwards, to wit, on the 20th of November, 1873, refused, as he lawfully might, to admit and institute the plaintiff to the said church; but the defendant was always then and thenceforth until and including the 30th of November, 1873, ready and willing to admit and institute a fit clerk, other than the plaintiff himself, upon the presentation of the plaintiff,—of which the plaintiff had notice: and that the hindrance of the plaintiff's right in the declaration stated is the said refusal of the defendant to admit and institute the plaintiff as aforesaid, and no other.

Demurrer to the first plea, on the ground that "the 13 Anne, c. 11 [12 Anne, st. 2, c. 12], relates only to the purchase of the next presentation, and does not apply to the purchase of a freehold estate in the advowson itself, such as the plea admits to have been purchased by the plaintiff."

Demurrer to the second plea, on the ground that "no reason is alleged for refusing to admit and institute the plaintiff, and that the defendant had no right to refuse without some lawful and sufficient reason, and was bound to shew to the Court in his plea the reasons of his refusal, that it might be legally tried and decided whether such reasons were lawful and sufficient or not."

Joinder in demurrer.

B. Shaw (*A. J. Stephens, Q.C.*, with him), in support of the demurrers. The question intended to be raised by the first plea is, whether the plaintiff, when for a valuable consideration he became seised of this advowson as tenant for the life of Sir John Sutton, was buying a "next presentation," within the meaning of s. 2 of 12 Anne, stat. 2, c. 12. (1) That statute relates only to

(1) This section, after reciting that "whereas some of the clergy have procured preferment for themselves by buying ecclesiastical livings, and others have been thereby discouraged," enacts that, "if any person, from and after the 29th day of September, 1714, shall or do, for any sum of money, reward, gift, profit, or advantage, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly, in his own name, or in the name of any other person or persons, take, procure, or accept the next avoidance of or presentation to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, and shall be presented or collated thereupon, that then every such presentation or collation, and every admission, institution, investiture, and induction upon the same,

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the purchase of the next presentation, and does not apply to the purchase of a freehold estate in the advowson, such as the first plea admits to have been purchased by the plaintiff, nor to a presentation by virtue thereof. In Fearne's Posthumous Works, p. 409 (Cases and Opinions), the author says: "The 12th Anne, stat. 2, c. 12, prohibits a clergyman's purchasing the next avoidance or presentation to any benefice for himself; but I do not apprehend that statute at all affects the case of a purchase of the perpetuity of the advowson, or affects the right of presentation in that case:" and in 1 Bythewod's Conveyancing, 3rd ed. p. 568, citing this passage, the editor, observing upon a doubt suggested by Mr. Jarman, says, "That view, however, is consistent with the generally received opinion of the profession upon the subject, and, it is conceived, with the sound construction of the statute; for, it seems to be impossible, without a manifest departure from the strictness of construction which is always given to a penal statute, to treat the words 'next avoidance or presentation' as extending to an advowson." So, in Prideaux's Conveyancing, vol. 1, p. 346, it is said: "A vendor has no power to grant the next presentation during a vacancy: *Baker* v. *Rogers* (1); so that, if a conveyance is executed of an advowson in fee during a vacancy, the immediately pending right of presentation would not pass to the purchaser: *Grey* v. *Hesketh.* (2) If, however, the church be not vacant at the date of the purchase, the purchaser of an advowson in fee, if he is a clergyman, may present himself on the next vacancy. The purchaser, however, of a next present-

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shall be utterly void, frustrate, and of no effect in law, and such agreement shall be deemed and taken to be a simoniacal contract; and that it shall and may be lawful to and for the Queen's Majesty, her heirs and successors, to present or collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only; and the person so corruptly taking, procuring, or accepting any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have and enjoy the same benefice, dignity, prebend, or living ecclesiastical, and shall also be subject to any punishment, pain, or penalty limited, prescribed, or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made after such benefice, dignity, prebend, or living ecclesiastical had become vacant; any law or statute to the contrary in any wise notwithstanding."

(1) Cro. Eliz. 789.

(2) Ambl. 268.

ation cannot present himself under any circumstances: 12 Anne, st. 2, c. 12: but it is not simony for him to make the purchase with a view to the nomination of any other person: *Fox* v. *Bishop of Chester* (1); Cru. Dig. tit. 21, ch. 2, s. 69." In Sugden's Handy Book on Property Law, 8th ed. p. 122, it is said: "A clergyman is prohibited from buying a presentation for his own preferment; but he may purchase the advowson itself, and upon a vacancy cause himself to be presented."

[KEATING, J. There is no allegation in the plea that the plaintiff purchased the advowson with the intention of presenting himself on the next avoidance. This is an attempt to make a contract simoniacal by matter ex post facto, viz. the death of the tenant for life.

LORD COLERIDGE, C.J. *Rennell* v. *Bishop of Lincoln* (2) shews that a right of next presentation is personal property.]

The second plea is equally bad. The bishop could not lawfully refuse to institute the plaintiff without a sufficient cause.

[LORD COLERIDGE, C.J. *The Bishop of Exeter* v. *Marshall* (3) shews that the defendant should have set out in his plea the reasons for his refusal to institute the plaintiff, so that he might take issue on the objection. We had better hear Mr. Phillimore.]

W. G. Phillimore, contrà. As to the first plea,—this case is distinctly within the prohibition of the statute 12 Anne, st. 2, c. 12, s. 2. The title of the Act is important: it is "an Act for preventing any ecclesiastical persons from buying the next avoidance of any church preferment." The object aimed at by the preamble to s. 2 was, "the procuring by the clergy of preferments for themselves by buying ecclesiastical livings." There is nothing illegal in a clergyman's buying the advowson; but he cannot present *himself* on the next avoidance.

[DENMAN, J. In *Fox* v. *Bishop of Chester* (4), the House of Lords declined to extend by equity the construction of the statute of Anne.

(1) 6 Bing. 17.

(2) 3 Bing. 223; 7 B. & C. 113; nom. *Mirehouse* v. *Rennell*, 8 Bing. 490; 1 Cl. & F. 527.

(3) Law Rep. 3 H. L. 17.

(4) 1 Dow. & C. 416; 3 Bli. (N.S.) 123; 6 Bing. 1.

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KEATING, J. It must be borne in mind that this is a highly penal statute.]

A penal statute, like any other, must be construed according to the ordinary meaning of its language: *Dyke* v. *Elliott.* (1) In delivering the judgment of the Privy Council, Lord Justice James says: "It was much pressed in the Court below, and again before their lordships, that, the statute being a penal one, or, as it was phrased, a highly penal one, it was to be construed strictly. It appears to their lordships necessary to say a few words as to this topic, which is so often pressed in argument. No doubt, all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But, where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used; and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

[LORD COLERIDGE, C.J. Here the words are perfectly plain. If any person shall for money, &c., "take, procure, or accept the next avoidance of or presentation to any benefice, &c., and shall be presented or collated thereupon, such presentation or collation, &c., shall be utterly void," &c. It treats the advowson and the next presentation as two distinct things; the one being real, the other personal property.]

The statute does not affect to deal with any distinction between real and personal property.

[LORD COLERIDGE, C.J. The 31 Eliz. c. 6 also makes a plain distinction between advowsons and next presentations.]

(1) Law Rep. 4 P. C. 184, 191.

There is nothing to prevent a clergyman buying an advowson; but, when he presents himself on the first avoidance, then the simoniacal taint arises. The expression "next presentation" means everything which includes the next presentation. It is a term of art, which "next avoidance" is not. The case is no doubt one primæ impressionis: but the general notion of the profession is opposed to such a transaction as this. In Dart's Vendors, vol. i, p. 225, 4th ed., it is said: "When the church is void, the right of immediate presentation cannot be sold either alone or as part of the advowson; and the purchase of a next presentation by a clerk, with a view to present himself, is prohibited by statute as simoniacal. (1) This enactment is not found in practice to prevent purchases of entire advowsons by clergymen, with a view to present themselves upon the next vacancies; but the terms of the Act and of the oath against simony generally suggest greater difficulties to the mind of the conveyancer than to that of the clerical casuist."

[LORD COLERIDGE, C.J., referred to *Greenwood* v. *Woodham*. (2)]

Assuming that a clergyman may, where he has purchased the advowson, whether in fee or pur autre vie, present himself on the first avoidance,—here, the plaintiff bought the life-interest of Sir John Sutton, and, the church being vacant, before the plaintiff presented himself to the bishop the tenant for life died, and the plaintiff knew that fact. What he purchased in fact was the next avoidance, and nothing more. If this be lawful, the whole object of the statute will be frustrated.

The gist of the action is the wrongful hindrance of the plaintiff's right. The foundation of the second plea is that a patron cannot present himself: he may tender himself to the ordinary, and pray the ordinary to admit him; and the ordinary may reject him.

[LORD COLERIDGE, C.J. He must assign a reason; for instance, simony, plenarty, non-age, or that the clerk is minus sufficiens. I have always understood that to be a cardinal rule.]

Here is no presentment at all. The declaration is in an unusual form; it introduces for the first time words not found in any of the precedents,—"or otherwise legally require institution," because the plaintiff well knew that there was no legal presentation.

(1) 12 Anne, st. 2, c. 12. (2) 2 Mood. & Rob. 363.

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In Burn's Ecclesiastical Law, Presentation, p. 16, it is said: "No person may present himself; and this is according to the rule of the canon law. But the books of common law say that, though a patron cannot present himself in form, yet he may offer himself to the ordinary and pray to be admitted, and that such admission may be good. But the more legal and regular way is, to make over the right to some other before the avoidance." And this is adopted in 1 Phillimore's Ecclesiastical Law, p. 403.

[LORD COLERIDGE, C.J. The same is laid down in Godolphin and in Brooke's Abridgment, Corporations, 34, where authorities are cited which do not support the proposition. Every case referred to is the case of a corporation, which stands upon a totally different footing.]

The proposition laid down in Burn's Ecclesiastical Law, Presentation, p. 16, is also to be found in Mallory's Quare Impedit, vol. 3, pp. 76, 87; Brooke's Abridgment, Presentments, pl. 45; Ayliffe's Parergon, p. 412; Gibson's Codex, lib. 34, c. 2, p. 794; Watson's Complete Incumbent, 4th ed., c. 20, p. 222; Rogers on Ecclesiastical Law, tit. Incumbent, p. 543, 2nd ed.; Dr. Stephens's Laws of the Clergy, tit. Presentation, p. 949; Cripps's Laws of the Church, 5th ed. 565. In *Potter* v. *Chapman* (1), Dr. Potter (late Archbishop of Canterbury) by his will devised to his executors (of whom Dr. Paul and Dr. Chapman were the survivors) all his options, "in trust, nevertheless, that, in disposing of the said options, regard be had, according to their discretion, to my eldest son, Dr. Potter, archdeacon of Oxford, to my sons-in-law, to my present and former chaplains," &c. One of the options being vacant, Dr. Paul presented Dr. Chapman (who had been formerly chaplain to his Grace) to the bishop to be installed. Upon a bill to set aside the presentation, Lord Hardwicke, C., said (2): "It was made a doubt whether, in case of the death of Dr. Paul, the defendant Chapman would not be incapable of any of these options, for *he could not present himself*, and, after the death of the incumbent, he cannot assign the trust. It was said in answer, that he may offer himself: but, in Watson's Complete Incumbent (a very well wrote book), the reason why he cannot present himself is said to be because it would create a plenarty,

(1) Amb. 98. (2) Amb. at p. 101.

see Dr. Davis's Reports, 77. I have no doubt of it: never was clearer in my opinion." The reason why a clerk cannot present himself is, that he cannot be both donor and donee: Bro. Corporations, pl. 34; *The Bishop of Ossory's Case* (the Case of Commendam), Davis, p. 68; *Hecker's Case* (1); Year Book, E. 13 Hen. 8, fo. 12, pl. 2, and in error, M. 14 Hen. 8, fo. 2, pl. 2.

[LORD COLERIDGE, C.J. *Hecker's Case* (1) was purely a technical question of pleading. The result of that case is, that, though a corporation cannot present its head, it may present any other of its members: Bro. Abr. Presentments al Esglise, pl. 23.]

So, dean and canons may present a canon, and master and fellows may present a fellow; for, non constat that the canon or fellow presented was one of the majority; but the head must join. The second plea sufficiently raises the point: the only refusal alleged is on the presentment of the plaintiff himself.

Shaw, in reply. If the declaration in this case is in a novel form, it is because this is the first case where a bishop has claimed a right to refuse to institute a clerk in this way. The second plea is uncertain; it does not shew any reason for the bishop's refusal; and a plea in quare impedit must be so framed as to give a certain issue. The argument that a man cannot present himself is inapplicable. The presentation passes nothing at law; it is not a gift of the living; the right to enjoy the living is given by institution and induction: 1 Bl. Com. 390, 391; 1 Burn's Ecclesiastical Law, 176. So, though a man cannot by a conveyance operating at common law grant an estate to his wife, yet a copyholder may surrender a copyhold to the use of his wife, because the estate passes, not by the surrender, but by the admittance: *Bunting* v. *Lepingwell* (2); Bacon's Abridgment, Copyhold (G). So, a man cannot enfeoff himself; but he may enfeoff A. to the use of himself. If *Hecker's Case* (1) be law at the present day, the declaration in *Marshall* v. *Bishop of Exeter* (3) would have been faulty. The same objection might also have been taken in *Storie* v. *Bishop of Winchester*. (4) [He also referred to Godol-

(1) See 3 Bulstr. 43.
(2) 4 Co. Rep. 29 a.
(3) 7 C. B. (N.S.) 653; 29 L. J. (C.P.) 354.
(4) 19 L. J. (C.P.) 217; 9 C. B. 62; 11 C. B. 653.

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phin, 255, *Elvis* v. *Archbishop of York* (1), and *Apperley* v. *Bishop of Hereford.* (2)]

LORD COLERIDGE, C.J. As this case involves a question of some novelty, and may possibly go to a Court of error, we think it will be more convenient to put the grounds of our judgment into writing.

Cur. adv. vult.

April 15. The judgment of the Court (Lord Coleridge, C.J., and Keating, Grove, and Denman, JJ.,) was delivered by

LORD COLERIDGE, C.J. This was an action in the nature of a quare impedit brought by the plaintiff, a clerk in holy orders, against the Bishop of Lincoln. The material facts as disclosed by the pleadings were as follows:—Sir John Sutton became, under certain family settlements, seised for an estate for his own life in, amongst other things, the advowson of the rectory of Great Coates, in the county of Lincoln. This advowson Sir John Sutton conveyed by deed, for and during his own life, for the sum of 3000*l.*, to the plaintiff, who thereupon became seised of the advowson as in gross by itself, as of right, for the term of the natural life of Sir John Sutton. During the life-time of Sir John Sutton, the incumbent died, "whereby (in the words of the declaration, which it becomes here important to set out,) it then and there belonged and still belongs to the said plaintiff to present, or otherwise legally require institution for, a fit clerk to the said church, being so vacant as aforesaid; but the defendant, the said bishop, will not permit him, but unjustly hinders him."

The defendant has pleaded two pleas. In the first he states the fact of the purchase by the plaintiff, as already mentioned, and goes on to say that the vacancy caused by the death of the last incumbent was the next and only avoidance of the church which happened or accrued to the plaintiff after his purchase of the said advowson for the term aforesaid. He further says that, by the 13th of Anne (I presume he means the Act which stands in the Statute Book as 12 Anne, stat. 2, c. 12), such presentation of himself by the plaintiff as aforesaid became and was utterly

(1) Hob. 315, at p. 317. (2) 3 M. & Sc. 102.

void, frustrate, and of no effect in law, and any admission or institution of the plaintiff thereon would have been utterly void, frustrate, and of no effect in law, and that therefore he could not institute the plaintiff, and refused to do so. The second plea is, we are inclined to think, insufficient as it stands, because it omits to state with clearness and precision the grounds of the bishop's refusal. But it is not material to discuss this point. It was held in this Court, in *Marshall* v. *Bishop of Exeter* (1) that the provisions of the Common Law Procedure Acts apply to quare impedit; and, as both parties here are agreed that the broad point intended to be raised is, whether any patron can lawfully present himself, we should have amended the plea, if necessary, to raise that point; and we proceed to deal with it on the assumption that it does raise it, and that it states that for the simple reason that the owner of the advowson presented himself the bishop refused to institute him.

Now, these pleadings raise, and were intended to raise, two points,—1. Whether there had been by the plaintiff in this case the purchase of what was equivalent to a next presentation, so as to make the contract between Sir John Sutton and the plaintiff a simoniacal contract within 12 Anne, stat. 2, c. 12, s. 2, and to be followed by the consequences pointed out in that statute; and, secondly, whether what had been done by the plaintiff was a presentation of himself to the bishop, so as to make it a bad and void presentation.

As to the first point,—it was not argued before us at any great length. In truth, it seems to us untenable. The statute of Anne is pointed at a specific evil, and uses words apt for the prevention of the evil which it is intended to prevent. The title, which is no part of the statute, but which often throws light upon it, describes the Act as one, inter alia, "for preventing any ecclesiastical persons *from buying the next avoidance* of any church preferment." The statute is one of a number passed in pari materiâ; and in several of them (e.g. 31 Eliz. c. 6) next presentations and advowsons are both mentioned, and distinguished from one another. It is a penal statute; and the rule that penal statutes are to be strictly construed, i.e. that there must be a clear case to make a

(1) 7 C. B. (N.S.) 653; 29 L. J. (C.P.) 354.

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man subject to a penalty, is, I apprehend, in full force; and, certainly, if it is a right rule in any class of statutes, it is right in those which relate to simony, for it cannot be said that the law upon the subject is in a state at all satisfactory to common sense or right feeling. There may, no doubt, be cases of simony in which the moral baseness is obvious enough. But there may be cases,—there have been probably in every one's experience,—in which, though the laws against simony have been technically transgressed, the transgessors have been men of high character and pure motive, and the transgression itself, but for the law, has been an act free from any taint of moral evil. In such a subject-matter, therefore, it would be contrary to principle to extend the words of a highly penal statute, which uses terms of art, to cases not included within the terms so used.

Now, the statute enacts that, "if any person shall for any sum of money" (and so forth) "take, procure, or accept *the next avoidance of or presentation to* any benefice with cure of souls, &c., then every *such* presentation or collation, and every admission, institution, investiture, and induction upon the same, shall be utterly void, frustrate, and of no effect in law, and such agreement shall be deemed and taken to be a simoniacal contract." And then the section proceeds to set out the penalties. Now, this, for the reasons already given, is the purchase of an advowson and not of a next presentation, and is not therefore within the words of the statute.

But it is said, though not within the words, this case is within the spirit. In such a statute as this the words are the spirit. The interest purchased was a freehold interest, and the number of presentations which might in fact take place under the purchase was wholly uncertain and unascertained. Advowsons are one thing,—real property descendible to the heir; next presentations are another,—personal property, and passing to the executors or administrators: *Rennell* v. *Bishop of Lincoln*. (1) The statute of Anne uses the term "next presentation," and avoids the use of the term "advowson;" and the purchase of an advowson is therefore not within it.

No case was cited to us in which the point had been decided:

(1) 8 Bing. 550.

but it is not denied that the general practice and the general understanding are against the defendant. The opinions of Mr. Fearne and Lord St. Leonards are as high authority as mere opinions can be; and they are with the plaintiff.

It was argued, however, as an advowson contained in it the right of next presentation, that for the plaintiff to use an advowson for an object which he could not have purchased by itself from the owner of the advowson, brings him within the words of the statute. An ingenious but untenable argument; for, as has been pointed out, advowsons and presentations are well known to the legislature, and the first exercise of his right by the purchaser of an advowson must always be, in one sense, and as far as the purchaser is concerned, a next presentation, and yet such a next presentation is if not intentionally yet clearly omitted from the provisions of the statute. The first point, therefore, fails the defendant, and there must be judgment against him on the demurrer to the first plea.

The second point is on first view more tenable; for, it is supported apparently by the authority of text-writers; and decided cases are appealed to as warranting the statements of the text-writers. The passage on this subject in Burn's Ecclesiastical Law, tit. Benefice, Presentation, p. 16, is copied with scarcely the change of a word from earlier authorities, and is as follows:—"No person may present himself; and this is according to the rule of the canon law. But the books of common law say that, though a patron cannot present himself in form, yet he may offer himself to the ordinary and pray to be admitted, and that such admission may be good. But the more legal and regular way is, to make over the right to some other before the avoidance." The passage then goes on to state how is the law where the right of presentation is vested in more persons than one; and this connection is important when we come to examine the reasons given for the rule.

We need not discuss the canon law. By that law, no doubt, a multitude of restrictions, and this amongst others, were placed upon the rights of patrons. But, if not recognised by the Courts of law as part of the law of England, such canonical restrictions cannot be binding upon patrons of livings when seeking to enforce their common-law rights. "In the law of the realm, it (*i.e.* the

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canon) bindeth not," says the Doctor to the Student, p. 229. When, therefore, we come to examine what objections have been allowed to presentations of themselves by patrons, and upon what grounds, we find that the course which has been pursued in this case avoids the objections which have been allowed, and has never in itself been held open to objection in Courts of law.

The authorities cited by Burn for the general proposition are copied, like the proposition itself, from earlier books: and they are really reducible to the case which is cited as *Hecker's Case*, a case to be found reported in this Court in the Year Book of 13 Hen. 8 (1), and in the Court of error in the Year Book of the following year. (2) Brooke's Abridgment, Corporations, 34, is also cited: but this, when looked at, turns out to be only an abstract of the case just mentioned in the Year Books. The authority of the case is no doubt recognised by Lord Hardwicke in *Potter* v. *Chapman* (3), and by the various text-writers who both before and since his time have laid down the proposition in the same terms, and supported it by the same authorities. We may observe, in passing, that the great authority of Sir John Davis, to which we were referred by Mr. Phillimore, is not one of them. In the case of the *Bishop of Ossory* (4), the arguments only are reported; and Sir John Davis expressly says (5) that no judgment was ever given in the case. Thus, the sole authority for the proposition, as far as the common law Courts are concerned, is the case in the Year Books of Henry 8; and, when that is examined, the decision turns upon a technical point,—that the same person cannot be donor and donee, and therefore, when a corporation presents to a living, it can indeed present any of its members except its head, but that the head,—*Hecker's Case* (6) was that of the master of an incorporated hospital,—as he is necessarily mentioned in the description of the patron, cannot also be the presentee. It is on this ground,—a technical though sufficient one, and one entirely beside the canonical restriction,—that the Courts of law have admitted the rule of which *Hecker's Case* (6) is but an example.

(1) P. 13 H. 8, fo. 12, pl. 2.
(2) M. 14 H. 8, fo. 2, pl. 2.
(3) Amb. 98.
(4) Davis, 68.
(5) Davis, at p. 83.
(6) Year Book, E. 13 H. 8, fo. 12, pl. 2; M. 14 H. 8, fo. 2, pl. 2.

But here, as the defendant's plea shews, there has been no presentation, strictly so called. The patron has in the very words of the text-books, offered himself to the ordinary, and prayed to be admitted. To such a proceeding the technical objection against presentation does not apply; and there is none of substance. It is admitted that this is the first occasion on which a bishop has refused to institute on this ground. It is admitted that the understanding of lawyers and the unbroken practice are the other way. It has however been contended in this case that, if a patron to whom an advowson has descended as part of an ancestral property, and who is himself a clerk of unquestionable fitness for the living, offers himself and prays to be admitted, it is in the absolute discretion of the bishop, without assigning any reason, to admit or to reject him. For such a proposition there is no shadow of authority; it is contrary to the principles on which the rights of patrons have always been upheld in these Courts; and we are certainly not prepared to make a precedent which would seem to us to be entirely anomalous.

We may observe that, by the admission of the defendant's counsel, the objection of the bishop is one of the merest form. If the plaintiff had conveyed the advowson to a trustee, in trust to present a clerk on his the plaintiff's nomination, and if the plaintiff had nominated himself, the trustee would have been bound to present the plaintiff, and the bishop to institute him. The substance of the transaction would have been exactly the same, and the practical importance therefore of the bishop's contention, even if in this particular case he could have succeeded, has, if it exists, altogether escaped our view. But with this we are not concerned: our duty is simply to declare the law, as, after the best inquiry and consideration, we find it to be: and we think that the second plea, like the first, fails the defendant, and that therefore there must, upon the demurrers to both pleas, be judgment for the plaintiff.

Judgment for the plaintiff.

Phillimore, on behalf of the defendant, applied for a certificate under 4 & 5 Wm. 4, c. 39, that the bishop had a reasonable and probable ground of defence. That Act, after reciting that

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"the delay and expense of recovering advowsons, and the right of patronage and presentation to ecclesiastical benefices, by actions of quare impedit, are much increased by reason of the defendants in such actions not being liable for the payment of costs, and the patrons are thereby frequently deterred from the prosecution of their just rights, and that it is also expedient to afford further protection to incumbents of advowsons from vexatious and unfounded proceedings to disturb them in the enjoyment thereof,"—enacts "that, in all writs and actions of quare impedit issued or brought from and after the passing of this Act, where a verdict shall pass or be given for the plaintiff or plaintiffs in any such writ or action, the plaintiff or plaintiffs in every such writ or action, in addition to the damages to which he or they is or are by law now entitled, shall also have judgment to recover his or their full costs and charges against the defendant or defendants therein, to be assessed, taxed, and levied in such manner and form as costs in personal actions are now by law assessed, taxed, and levied; and where in any such writ or action the plaintiff or plaintiffs therein shall discontinue or be nonsuited, or a verdict shall be had against him or them, that they the defendant or defendants in every such writ or action shall have judgment to recover his or their full costs and charges against the plaintiff or plaintiffs therein, to be assessed, taxed, and levied in manner aforesaid: Provided always that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the judge who shall try the cause, or, if there shall be no trial by a jury, the Court in which judgment shall be given, shall certify that such archbishop, bishop, or other ecclesiastical patron or incumbent had probable cause for defending such action; but in no case where the defence to any such action shall be grounded upon a presentation or presentations, collation or collations, previously made to any benefice, shall such presentation or presentations, collation or collations, be deemed or considered probable cause for defending such action." He submitted that, having the authority of so many dicta and the opinions of text-writers of value in favour of the view which he took of his duty, the bishop might fairly be said not to have defended the action without probable cause; that the proviso in the Act that a defence grounded upon a presentation or

collation previously made to any benefice should not be deemed or considered probable cause for defending, afforded a strong inference that a defence like the present ought to be held to be founded upon probable cause; and that the bishop was already sufficiently punished by having to pay half a year's value of the living, under the statute.

Shaw, for the plaintiff, opposed the application. He submitted that the 4 & 5 Wm. 4, c. 39, was not imperative, and was wholly inapplicable to a case like the present, where the bishop was defending simply as ordinary; and he referred to *Edwards* v. *Bishop of Exeter* (1), where a certificate under that statute was refused.

LORD COLERIDGE, C.J. Being the only judge in Court of those before whom this case was argued, I must consult my learned Brothers before I dispose of this application.

April 18. LORD COLERIDGE, C.J., said: I have had the advantage of consulting Sir Henry Keating, whose assistance we had upon the argument of this case, as well as my Brothers Grove and Denman, upon the application which has been made to us on the part of the bishop for a certificate under 4 & 5 Wm. 4, c. 39; and we are all unanimously of opinion that there is no reason at all for granting such certificate. The ordinary course will therefore be followed, viz. that the unsuccessful party on these demurrers must pay the costs.

Judgment accordingly.

Attorneys for plaintiff: *Bockett & Son.*
Attorneys for defendant: *Walters, Young, Walters, & Deverell.*

(1) 6 Bing. N. C. 146.

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Vendor and Purchaser—Purchaser's Right to insist upon the Presence of the Vendor at Completion—Damages for Purchaser's Default—Deposit.

Upon a sale of real property, the purchaser has not an absolute right in all cases to require the vendor's presence at the completion of the purchase. Whether such a requisition is reasonable or not, will in each case be a question for the jury.

The fact of the vendor having been confined in a lunatic asylum is not a reasonable ground for insisting upon a departure from the ordinary course, when it is duly certified and sworn that he was competent at the time of executing the conveyance.

By the conditions of sale it was provided as follows:—"Should the purchaser neglect or fail to comply with any of the above conditions, his deposit-money shall be absolutely forfeited to the vendor, who shall be at liberty to re-sell the property by public auction or private sale; and, if the amount or price which shall be obtained by such second sale shall not be sufficient to cover the amount bid for the same at the present sale and all the expenses of or incidental to the present sale, the deficiency shall be paid by the defaulter to the vendor." The purchaser paid a deposit, but failed to complete the purchase. There was no re-sale:—

Held, that the vendor was entitled to retain the deposit, and also to recover the auctioneers' charges for the abortive sale, and the costs incurred by him in preparing to complete the sale.

THE declaration in the first action stated that the plaintiff, on the 28th of October, 1873, caused to be put up for sale by public auction a messuage and land mentioned in certain particulars of sale, upon and subject to the following amongst other conditions of sale:—

3. The purchaser shall immediately after the sale pay into the hands of the auctioneers a deposit of 20*l.* per cent. on and in part payment of his purchase-money, and sign an agreement for payment to the vendor of the balance of his purchase-money on the 1st of December next at the office of his solicitors, Messrs. Heather & Son, No. 17 Paternoster Row, in the city of London: but if, from any cause whatever, the purchaser shall not complete his purchase on that day, he shall pay interest after the rate of 5*l.* per cent. per annum upon the balance of his purchase-money from that time until the actual completion of his purchase; and on such completion he shall be entitled to possession of the premises.

4. The vendor will within seven days from the day of sale deliver to the purchaser or his solicitor an abstract of his title to the premises, commencing with indentures of lease and release bearing date the 23rd and 24th of October, 1829; and no earlier title shall be required, notwithstanding the same may be referred

to in one of these deeds, or in any subsequent deeds; nor shall any evidence of identity be required: and the purchaser shall within seven days after the delivery of the abstract deliver to the vendor's solicitors a statement of all his objections to or requisitions on the title; and any objections or requisitions not so stated shall be deemed to have been waived. The vendor being a mortgagee, and the mortgagor having since become bankrupt, the purchaser shall not require any other person to join in the conveyance to him except the vendor, nor any other covenant than a covenant that he has not incumbered.

5. The production of all deeds and documents not in the possession of the vendor, and all certificates, declarations, attested or office copies or extracts of or from any will, register, or other document, whether required for the purpose of verifying the abstract or otherwise, and all deeds of covenant, shall be procured and made at the expense of the purchaser.

6. If any objection or requisition shall be made which the vendor shall be unable or unwilling to remove, it shall be lawful for him, notwithstanding any attempt to remove the same, to rescind the contract; and thereupon the deposit paid by the purchaser shall be returned to him, but without interest or costs or any compensation whatever.

7. If any error or misstatement shall be discovered in the particulars, such error or misstatement shall not vitiate or annul the sale, but a reasonable compensation or allowance shall be given or taken as the case may require, such compensation or allowance to be determined by two indifferent persons, one to be named by the vendor and the other by the purchaser, and, in case of difference between them, by a third person to be agreed on by such two persons before they proceed on such reference.

8. And, lastly, should the purchaser neglect or fail to comply with any of the above conditions, his deposit-money shall be absolutely forfeited to the vendor, who shall be at liberty to re-sell the property by public auction or private sale; and, if the amount or price which shall be obtained by such second sale shall not be sufficient to cover the amount bid for the same at this present sale and all the expenses of or incidental to the present sale, the deficiency shall be paid by the defaulter to the vendor, and, in case of non-payment, the same shall be recoverable as and for liquidated damages.

Averment, that, upon such putting up to sale of the premises as aforesaid, the defendant was the highest bidder for the same and purchased the premises from the plaintiff, and the plaintiff sold the same to the defendant for 1000*l.* upon and subject to the said conditions of sale, and the defendant then paid the auctioneers such deposit as aforesaid, and that all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to maintain this action for the breaches hereinafter mentioned,—yet the defendant did not pay the plaintiff the remainder of the purchase-money nor complete the purchase on his part; whereby the plaintiff had been deprived of the advantage which would have accrued to him from the payment of the remainder of

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the purchase-money and from the completion of the purchase, and had lost the expenses incurred by him in and about endeavouring to sell the premises, and in preparing to complete the said purchase on his part, and in endeavouring to procure the completion of the purchase by the defendant: Claim, 500*l.*

Plea, that the defendant was always ready and willing to pay the remainder of the said purchase-money and to complete the purchase according to the conditions, whereof the plaintiff had notice, but the plaintiff was not ready or willing to receive the remainder of the purchase-money or to complete the purchase on his part according to the conditions. Issue thereon.

The cause was tried before Brett, J., at the sittings in Middlesex after last Hilary Term. The plaintiff was mortgagee of a house No. 36, Victoria Road, Clapham Common, for 1500*l.*, with a power of sale. Under instructions from Mr. William Essex, the plaintiff's uncle (who attended to all the family business), Messrs. Heather & Son employed Messrs. Driver to put up the premises in question for sale by public auction. They were accordingly put up for sale on the 28th of October, 1873, under, amongst others, the conditions set out in the declaration. The defendant being the highest bidder, the premises were knocked down to him for 1000*l.*, and he paid 200*l.* to Messrs. Driver as a deposit of 20*l.* per cent., and signed an agreement for payment to the vendor of the balance of the purchase-money on the 1st of December, 1873, at the office of the vendor's solicitors. On the 4th of November an abstract of the vendor's title was delivered to the solicitor of the purchaser, and requisitions thereon were delivered by the latter on the 10th or 11th. On the 11th of January, 1874, the purchaser's solicitor sent Messrs. Heather & Son the ingrossment of conveyance for examination, and a letter saying,—"I shall require, in accordance with my practice, to be present at the time of your client's execution." This the vendor's solicitors objected to as being unnecessary and unusual, and they procured the conveyance to be executed by the vendor (who was then residing at Seaford), and obtained his written authority to receive the balance of the purchase-money, and they gave notice to the purchaser's attorney that the conveyance was ready. The deed was executed in the presence of the vendor's uncle and of his sister; and his execution

thereof was attested by his brother: and these appeared to be the only relatives the vendor had. The conveyance was then tendered to the purchaser's attorney, and the purchase-money demanded; but he declined to complete the purchase, insisting upon his right to have the vendor present at the execution of the conveyance, and to pay the purchase-money to him.

In the course of the negotiations it transpired that the vendor's mind had been affected, and that he had been for some time confined in St. Luke's Hospital; and, to satisfy the scruples of the purchaser's solicitor, the following certificates were obtained:—

St. Luke's Hospital, London, June 24th, 1873.

Having on several occasions during the past twelve months, and more especially within the past week, seen Mr. Thomas Essex, I am of opinion that he fully understands the nature of the business he is called upon at present to attend to, and that his mental condition is such as to render him quite competent and capable of transacting such business and signing his name to the necessary papers.

Reginald Eages, M.D.,
Medical Superintendent of St. Luke's Hospital.

Bethlem Royal Hospital, 3rd July, 1873.

I have had two long interviews with Mr. Thomas Essex, on June 18th and July 1st, 1873, and consider him fully capable of understanding the management of his affairs. He is quite aware of the nature of the document he is about to sign, and is in my opinion most thoroughly competent to transact the business. Mr. Essex has a nervous manner when addressed; but at the present time I consider him to be of sound mind.

R. W. Williams, M.D.,
Resident Physician.

The uncle and sister of the vendor swore that at the time of the execution of the conveyance he was perfectly sane.

It was submitted for the defendant in the first action, that, under the particular circumstances of the case, the purchaser's solicitor was justified in refusing to allow his client to complete in the absence of the vendor.

The learned judge left it to the jury to say,—first, whether the defendant's objections were bonâ fide,—secondly, whether it was reasonable that the purchaser should insist upon the presence of the vendor at the completion of the purchase,—thirdly, whether it was reasonable to require further certificates as to the then condition of the vendor.

The jury found that the objections were not reasonable, but

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were captious objections to enable the purchaser to get rid of his bargain: and they returned a verdict for the plaintiff for 296*l.* 11*s.* 5*d.*, being 56*l.* 11*s.* 5*d.* for the auctioneers' charges on the abortive sale, 200*l.* the deposit money, and 40*l.* for the solicitors' charges.

In the cross-action, which was tried at the same time, and which was an action brought by the purchaser to recover back the deposit and interest, the 200*l.* had been paid into Court to abide the event, and a verdict was taken for the defendant.

Powell, Q.C., moved for a new trial on the grounds of misdirection, that the verdict was against the weight of evidence, and that the damages were excessive. As to the misdirection, the learned judge should have told the jury that the purchaser is entitled to insist upon the vendor being present at the completion of the purchase. The third condition of sale requires the balance of the purchase-money to be paid "to the vendor, at the office of his solicitors."

[ARCHIBALD, J. Is it not enough if the vendor has given his solicitor an authority to receive the money?]

It is the duty of the solicitor for the purchaser to insist upon the presence of the vendor, or upon some satisfactory explanation of his absence. In Sugden's Vendors, 13th ed., p. 455, it is said that "a purchaser cannot safely pay the purchase-money to the vendor's attorney without the seller's authority, although he is intrusted with the conveyance and is ready to deliver it up." Again, at p. 549, it is said: "Purchasers frequently run considerable risk in paying the purchase-money to the agent or solicitor of the seller upon the delivery of the conveyance: of course, if the agent is duly authorized to receive it, there will be no risk; but that is often not the case, and particularly where sales are made by trustees, who are all bound to join in the receipt, and who would not be justified in allowing their solicitor to receive the purchase-money, being trust money." In Dart's Vendors, vol. 2, p. 601, 4th ed., the rule is laid down thus: "As a general rule, a purchaser may insist on having the conveyance executed in his own presence, or attested by a witness of his own selection: but the rule is not invariable, and, in the absence of special cir-

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cumstances, ought not to be insisted on where it cannot reasonably be complied with. The agent or solicitor of the vendor cannot without special authority receive and give a discharge for the purchase-money: and the usual indorsed receipt is in equity no conclusive evidence of payment: the money, therefore, should in strictness be paid to the vendor personally, or upon his written authority; and it has been held that a purchaser may insist either on personal payment or on the production of a written authority." For this is cited *Viney* v. *Chaplin*. (1) The state of the vendor in this case justified the vendee in being more than ordinarily vigilant. In Dart's Vendors, 4th ed., vol. 1, p. 5, it is said: "The proposed vendor may be a lunatic or idiot, in which case, according to the early authorities, his conveyance may be set aside by his committee during his life, or by heirs after his death: yet he himself, though he recover his senses, is, it has been said, unable to avoid it; at least if made by feoffment with livery of seisin delivered by him in person. It has, however, been held that a bargain and sale, lease and release, or other innocent conveyance by a lunatic, is absolutely void: and the 8 & 9 Vict. c. 106, s. 4, which deprives a feoffment of its tortious operation, renders such a conveyance by a lunatic equally inoperative. But the rule against a party being allowed to stultify himself would not prevail in equity, nor, according to the modern authorities, at law, in favour of a purchaser who had knowingly dealt with an incompetent vendor; and it is now decided that the lunatic himself, as well as his representatives, may establish his lunacy in order to impeach a deed which he has executed. On the other hand, it has been held, at law, that, where a person apparently of sound mind, and not known to be otherwise, enters into a contract which is fair and bonâ fide, and is executed and completed, and the property forming its subject-matter cannot be restored so as to put the parties in statu quo, such contract cannot afterwards be set aside either by the alleged lunatic or his representatives: and, in equity, the result of the authorities seems to be that such transactions with a person apparently sane, though afterwards found to be of unsound mind, will not be set aside against those

(1) 4 Drew. 237; 2 De G. & J. 468, 482.

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who have dealt with him in the bonâ fide belief that he was of competent understanding."

[BRETT, J. Here, the solicitors were instructed by the vendor's uncle; and his brother attested his execution of the conveyance. The transaction never could have been impeached.]

It is not unimportant to bear in mind that this was a sale by a mortgagee.

[ARCHIBALD, J. The presumption would be that the vendor was sane at the time of the execution of the conveyance, if the purchaser did not impeach his sanity.]

In *Viney* v. *Chaplin*, Lord Chelmsford, C., says (1): "The questions which we are called upon to decide are, whether a purchaser has a right to insist upon having the conveyance attested by his solicitor or by a witness of his own selection, and whether he has also a right to require that the money shall be paid to the vendor personally, or in his presence. Upon these questions,—as to which the Court was strongly pressed at one period of the argument to give an opinion in the abstract,—there is very little in the way of authority to be found: the reason of which is obvious. Sales and purchases are generally conducted with mutual confidence: each party is anxious for the completion of the transaction, and unwilling therefore to interpose any unnecessary obstacles; and in general no necessity exists for any unusual precautions. Under ordinary circumstances, therefore, the purchaser's solicitor has no hesitation in accepting the conveyance though he has not witnessed its execution, or in permitting his client to pay the purchase-money to the solicitor of the vendor. But, suppose circumstances should arise in which the purchaser may feel that he ought to be armed with the most complete proof of the transaction, is he entitled to make himself thoroughly secure both as to the execution of the conveyance and as to the receipt of the purchase-money? It is quite clear that, if the purchaser pay his purchase-money to a person not authorized to receive it, he is liable to pay it over again. It may, I think, be considered as established, that the possession of the executed conveyance, with the signed receipt for the consideration money indorsed, is not in

(1) 2 De G. & J. at p. 477.

itself an authority to the solicitor of the vendor to receive the purchase-money. The difficulty is to see how the purchaser can be safe at all times from the danger of paying his money to an unauthorized person, without the vendor being present or having expressly given to the purchaser or his solicitor authority to pay it in a particular manner. The text-books speak of a written authority; but, how can the purchaser be sure that this is genuine? And, at all events, it may impose upon a purchaser a difficulty in the way of proof, to which he may have a right to object. It becomes, as was said in argument, a link in his chain of title which may hereafter embarrass him, and which it may be said the vendor ought not to be permitted to force upon him. On the other hand, many occasions may be suggested in which it would be most unreasonable for the purchaser to require the presence of a vendor or of several vendors dispersed in various parts of the country, or where he may be presumed to have waived the right to insist upon the vendor's attendance when the purchase-money is to be paid, by negotiating with a person who is not resident in this country. If the Court were to lay down a rule that the purchaser under all circumstances has this right, it might in many cases afford a party the means of escaping from his contract, as non-compliance with a requisition on which he is entitled to insist would be an answer to a bill for a specific performance. These are some of the difficulties with which the subject is embarrassed on the one side or on the other, and which make me very unwilling to decide any abstract question with relation to it. It will be sufficient for this case to say, that, if a purchaser has not the right in every case to insist upon the vendor being present when the purchase-money is to be paid, neither is a vendor entitled to refuse compliance with a request of this description when circumstances arise which are sufficient to justify it. It is not likely in the ordinary transactions between vendor and purchaser that the attendance of a vendor will be vexatiously required: but I think that the purchaser ought to have the right in reserve, to be used whenever a proper occasion arises for its exercise." His Lordship then proceeds to consider whether it was reasonable and proper, under the circumstances of that case, that the purchaser's solicitor should insist upon the vendor's

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executing the conveyance in his presence, and himself receiving the purchase-money: and in the result he concludes that it was. And Lord Justice Turner says (1): "I do not hesitate to say that, in my opinion, where the purchaser requires the deed to be executed by the vendor and attested by his own solicitor, that requisition ought not to be refused, unless there are special circumstances justifying the refusal. Whether there are special circumstances sufficient to justify refusal must depend in each case upon the particular facts."

[BRETT, J. I left it to the jury to say whether under the circumstances it was reasonable to require the presence of the vendor at the completion of the purchase: and they found that it was not. They thought it was a mere captious objection, to get off the purchase.

ARCHIBALD, J. The observations of Vice-Chancellor Kindersley in that case (2), which are exceedingly strong, would apply to bills of exchange.]

The judgment of Willes, J., in *Ex parte Swan* (3) shews the ground of the distinction between bills of exchange and conveyances by deed of land or other property.

The verdict was clearly against the weight of evidence. The purchaser's attorney might fairly come to the conclusion, looking at all the circumstances, that his client would not be safe in paying the balance of the purchase-money except in the presence of the vendor.

At all events, the damages awarded are excessive. In *Ockenden* v. *Henly* (4) the plaintiff put up for sale by auction real property, upon conditions of sale which stipulated that the purchaser of each lot should "forthwith pay into the hands of the auctioneer a deposit of 20 per cent. on the purchase-money, and sign an agreement to pay the remainder," &c., and that "if the purchaser of either lot shall fail to comply with these conditions, the deposit-money shall be actually forfeited to the vendor, who shall be at full liberty to re-sell such lot, &c., and any deficiency that may arise upon such re-sale, together with all expenses attending the same, shall immediately after such second sale be made good by such

(1) At p. 483. 4 Jur. N.S. 622
(2) 4 Drew. 239.
(3) 7 C. B. (N.S.) 400, 448.
(4) E. B. & E. 485.

defaulter," &c. The defendant became a purchaser at the auction, but did not pay the deposit or complete the purchase. The plaintiff re-sold at a price below that for which the defendant had purchased, and the deficiency with the expenses of sale exceeded the amount of the deposit; and it was held that the plaintiff was entitled to recover from the defendant the amount of the deficiency and expenses only, and not in addition to this the amount of the deposit. Lord Campbell, C.J., says: (1) "There having been an actual forfeiture of the deposit by the express words of the seventh condition, the deposit, if paid, could not in any event have been recovered back by the purchaser; and the seller would have been entitled to any additional benefit on a re-sale. But, the seller having obtained a right to the forfeited deposit, and making a further demand of damages sustained on the re-sale, it becomes necessary to consider what was the nature of the deposit. Now, it is well settled that, by our law, following the rule of the civil law, a pecuniary deposit upon a purchase is to be considered as a payment in part of the purchase-money, and not as a mere pledge. (2) Therefore, in this case, had the deposit been paid, the balance only of the purchase-money would have remained payable. What, then, according to the seventh condition, is the deficiency arising upon the re-sale which the seller is entitled to recover? We think the difference between the balance of the purchase-money on the first sale and the amount of the purchase-money obtained on the second sale; or, in other words, the deposit, although forfeited so far as to prevent the purchaser from ever recovering it back, as, without a forfeiture he might have done,—*Palmer* v. *Temple* (3),—still is to be brought by the seller into account if he seeks to recover as for a deficiency on the re-sale." Here, the jury have given the vendor the deposit, and also the expenses; whereas, according to that case, he cannot be entitled to both.

[BRETT, J. The purchase did not go off for a defect of title, but on the purchaser's refusal to take a conveyance. Where the title is good, and a conveyance is tendered, the vendor is clearly entitled to recover the expenses he has been put to. The plaintiff

(1) E. B. & E. at p. 492. (2) Sug. V. & P. ch. 1, § 3, art. 18, 13th ed.
4 June 1875 (3) 9 Ad. & E. 508.

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should recover the 96*l.* 11*s.* 5*d.* in the first action, and is entitled to keep the deposit.]

Bain v. *Fothergill* (1) was referred to.

LORD COLERIDGE, C.J. With regard to the last point, the Court are disposed to grant a rule, unless the counsel for the plaintiff will consent not to claim the expenses and the deposit both in the first action, otherwise not. The eighth condition provides that, "should the purchaser neglect or fail to comply with any of the above conditions, his deposit-money shall be absolutely forfeited to the vendor, who shall be at liberty to re-sell the property by public auction or private sale; and, if the amount or price which shall be obtained by such second sale shall not be sufficient to cover the amount bid for the same at this present sale and all the expenses of or incidental to the present sale, the deficiency shall be paid by the defaulter to the vendor, and, in case of non-payment, the same shall be recoverable as and for liquidated damages." The deposit, therefore, is absolutely forfeited, and the vendor is at liberty, not bound, to re-sell, and may recover against the purchaser any deficiency on the second sale, together with the expenses of the first sale. The property not having been re-sold in this case, the expenses to which the vendor has been put with reference to the abortive sale are recoverable from the purchaser, plus the deposit-money. The case of *Ockenden* v. *Henly* (2) has been referred to; but the circumstances of that case, which are somewhat complicated, are wholly different from those of the present; the deposit had never been paid, and the action was brought for the loss on the re-sale and the expenses of the re-sale; those expenses formed part of the deficiency on the re-sale occasioned by the default of the purchaser; the loss on the second sale would be the deficiency of price and the expenses.

It remains to be considered whether there has been any misdirection here, or whether the verdict was against the weight of evidence. When the authorities come to be looked at, I am of opinion that there is no ground for saying that there has been any misdirection. The facts were these:—Before the purchase was

(1) Law Rep. 6 Ex. 59; Law Rep. 7 H. L. 158.
(2) E. B. & E. 485.

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completed, the purchaser's solicitor conceived that he had ascertained that the vendor was not in his right mind, and that therefore he had a right to satisfy himself that he was in a fit state to execute a conveyance, by insisting upon his presence at the completion of the purchase. Mr. Powell advanced two propositions—first, that a purchaser has an absolute right to require the presence of the vendor; secondly, that, under the circumstances of this case, it was reasonable that he should be present. In support of the first contention he relied upon *Viney* v. *Chaplin*. (1) There are in that case, no doubt, exceedingly strong dicta,—and especially by Kindersley, V.C.,—to the effect that the purchaser is not bound to pay the purchase-money to anyone but the vendor himself, and that he is not called upon to incur the risk of paying it to an unauthorized person; and the Lord Chancellor and Lord Justice Turner affirm his judgment, and seem to give countenance to his reasoning in a qualified way. Lord Chelmsford says: (2) "If a purchaser has not the right in every case to insist upon the vendor being present when the purchase-money is to be paid, neither is a vendor entitled to refuse compliance with a request of this description when circumstances arise which are sufficient to justify it." And he adds: "I think that the purchaser ought to have the right in reserve, to be used whenever a proper occasion arises for its exercise." The judgment proceeds upon the ground that the purchaser is entitled to be satisfied that he has got the right vendor. It is enough, therefore, to say that that case is not in point here. There is no question of identity; no dispute as to the solicitors being properly authorized to receive the money: but the question is whether the evidence of the former insanity of the vendor was sufficient to entitle the purchaser to proof, by a personal interview, of the admitted sanity of the vendor at the time of the completion of the purchase. This brings us back to the real question, viz. whether the objection was a reasonable one to make; and I think that, under the circumstances, it was utterly unreasonable. It seems that in the year 1872 this gentleman was in confinement as a lunatic. He was discharged cured in June of that year, and two certificates attesting his perfect capacity to execute a conveyance in 1873 were offered to the purchaser's solicitor. I think there

(1) 4 Drew. 237; 2 De G. & J. 468.

(2) 2 De G. & J. at p. 478.

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was a manifest want of evidence to justify the claim made. The conveyance was executed by the vendor in the presence of his uncle and his sister; and his execution was attested by his brother: and these appear to be all the relatives he had. There was also evidence that he was at the time sane, and that he was absent only because he was paralyzed. Under these circumstances, I am not surprised that the jury should find that the objections were not bonâ fide, and that it was unreasonable to ask for any further certificate of his present sanity. It seems to me that there was abundant evidence to justify the jury in coming to the conclusion they did; and, as my Brother Brett is not dissatisfied with the verdict, I see no ground for interfering with it.

DENMAN, J. I am of the same opinion. With respect to the question of damages, the doctrine in *Ockenden* v. *Henly* (1) only applies where the power of re-sale has been exercised; here it has not. With regard to the other ground of the motion, I think my Brother Brett was not bound to tell the jury that a purchaser has an absolute right to insist upon the presence of the vendor at the completion of the purchase. It must be a question for the jury in each case whether it is a reasonable requirement or not; and I think there was sufficient evidence that it was not reasonable in this case. The judgment of Lord Justice Turner in *Viney* v. *Chaplin* (2) puts the question very clearly,—whether there are special circumstances to justify the refusal to comply with such a requisition must depend in each case upon the particular facts. Three questions were left to the jury,—1. whether the defendant's objections were bonâ fide,—2. whether it was reasonable that the purchaser should insist upon the presence of the vendor at the completion of the purchase,—3. whether it was reasonable to require further certificates as to the then condition of the vendor. As to the first, I must confess that if I had been on the jury I should have had some difficulty in coming to the conclusion that the objections were not bonâ fide. The second question the jury answered in the negative; and I agree with them. I cannot say that my opinion as to the third question is so strong; but, inasmuch as my Brother Brett is not dissatisfied with the verdict upon

(1) E. B. & E. 485. (2) 2 De G. & J. at p. 483.

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that, I am not disposed to dissent. Upon the whole, I agree that the rule should be refused, subject to the suggestion thrown out by my Lord.

ARCHIBALD, J. I am of the same opinion. The rule will be granted for reduction of damages, unless the plaintiff's counsel will consent to forego the claim for the deposit in the first action, that sum having already been brought into Court to abide the result of the second action. The eighth condition gives the vendor the absolute right to retain the deposit-money paid, on the purchaser's failure without any default of the vendor to complete the purchase; and also a right to claim the expenses of re-sale, if the property is re-sold. The sale having proved abortive through the default of the purchaser, the vendor is entitled to retain the deposit, and to recover the expenses which he has incurred through that default; he will, therefore, recover the 96*l.* 11*s.* 5*d.* The case of *Viney* v. *Chaplin*, before Vice-Chancellor Kindersley (1), and afterwards on appeal before the Lords Justices (2), is distinguishable from the present. That case only establishes this, that the purchaser is entitled to evidence of the identity of the vendor and of the authority of his solicitor to receive the money, but not that the purchase-money shall be received by the vendor himself. The question here is, whether reasonable evidence was given of the competency of the vendor. That question was left to the jury, and they found that it was not reasonable for the purchaser to require further evidence on that subject. The mere fact of the vendor having been a lunatic two or three years before would not, I apprehend, make it reasonable to require his presence at the completion of the purchase, or the production of any further evidence of his sanity than the two certificates which were offered to the purchaser's solicitor. I think the verdict was quite right; and, as my Brother Brett is not dissatisfied with it, I agree with my Lord and my learned Brother who has preceded me that there should be no rule.

BRETT, J. The first of these actions was brought by a vendor to recover damages on the ground that the purchaser declined to

(1) 1 Drew. 239. (2) 2 De G. & J. 468.

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accept a conveyance and pay the balance of the purchase-money pursuant to the conditions of sale. It is contended on the part of the defendant that I misdirected the jury, inasmuch as I declined to tell them that the presence of the vendor at the time and place appointed for the execution of the conveyance and payment of the purchase-money is a condition precedent to the vendor's right to sue the purchaser for refusing to complete. If that proposition be true, the purchaser of real property has an absolute right,—without assigning any reason, but acting from mere caprice, and although a perfect title has been shewn, and there is nothing in the conditions of sale to warrant it, and however inconvenient by reason of absence from England or otherwise it may be for the vendor to attend—to require the vendor to be present at the completion of the purchase. Mr. Powell argues for this absolute right upon three grounds. First, he says the purchaser has a right to say that without seeing the vendor he has no means of ascertaining his identity, although he may have no doubt upon the subject. Further, he says he has that right as an implied part of the contract, one of the conditions being that the purchaser shall sign an agreement for payment to the vendor of the balance of his purchase-money, on &c., at the office of his solicitors,—that he has a right to say, however cogent the evidence of authority in the solicitors to receive the money, he will not pay it except into the hands of the vendor himself. He may say, it is urged, that the vendor may be insane and therefore incapable of giving a good title, although there is no real dispute or any suggestion of evidence that he is insane. It is said that there are authorities in the Court of Chancery, or rather dicta, to shew that there is such an absolute right. If, however, the judgments referred to are to receive the construction for which Mr. Powell contends, they must apply equally to every other description of contract; and it is impossible to conceive how business could be carried on if that strict rule were to prevail. I do not believe that any such doctrine was ever intended to be enunciated. There was no dispute here as to the identity of the person by whom the conveyance tendered was executed, or as to the validity of the authority which he had given to his solicitors to receive the money: but, the vendor being bound to give reasonable evidence of title, it is said that he failed to do

this, because some one had said that the vendor had at one period been in confinement as a lunatic. It may be taken to be true that some one had communicated that fact to the purchaser's solicitor; and he under the circumstances would be quite right in making inquiry on the subject. There was no disguise about it: it was admitted that the vendor had been an inmate of St. Luke's; but the purchaser's solicitor was informed that he had been discharged cured, and was shewn certificates as to his then condition by the principal medical men of that establishment and of Bethlem Hospital. He is further informed that the conveyance was executed by the vendor in the presence of his uncle and his sister; and the vendor's brother was the attesting witness. The instructions for the sale were given by the uncle. Thus, the only persons who could have any interest were, so to speak, assenting parties to the conveyance. Under these circumstances, it would be absurd to say that any doubt or dispute could ever arise. It seems to me that I left the proper question to the jury, viz. whether it was reasonable for the purchaser to require the presence of the vendor at the completion of the purchase,—the very question which Lord Chelmsford suggests in his judgment in *Viney* v. *Chaplin* (1), "was it reasonable and proper that the purchaser's solicitor should insist upon the vendor's executing the conveyance in his presence, and himself receiving the purchase-money?" It seems to me that the three questions were rightly put, and that the answer to each of them was quite in accordance with the evidence. There was no reasonable or probable cause for taking the objections which the purchaser's attorney did; and that is always considered evidence of want of good faith, and therefore the jury were well warranted in concluding that the purchaser was not acting bonâ fide.

Then, as to the damages. Under ordinary circumstances, where the purchaser fails to complete, without any default on the part of the vendor, the latter is entitled to recover all the expenses he has incurred in preparing for the sale, and also the loss incurred upon a re-sale, that is, the difference of price, if any. Here, by the conditions of sale, the deposit is absolutely forfeited upon the purchaser's

(1) 2 De G. & J. at p. 479. 4 Jur. N.S. 621

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default, and the vendor is also entitled to recover the expenses he has incurred. If he claimed in addition the difference between the sum bid at the first sale and that realised on a re-sale, then the case of *Ockenden* v. *Henly* (1) would apply. Here, however, there has been no re-sale. The vendor therefore is entitled in the first action to recover the expenses incurred by him in preparing for the abortive sale; and he is also entitled to retain the deposit-money of 200*l.* which was paid into Court to abide the event of the second action.

Rule refused.

Powell, Q.C., asked leave to appeal upon the point of misdirection. But the Court refused it.

Attorneys for Essex: *Heather & Son.*
Attorney for Daniell: *C. Thorp.*

April 24.

DUNCAN *v.* CASHIN.

Husband and Wife—Separate Estate of the Wife—Goods bought with her Separate Income—Interpleader Summons—Equitable Claims.

The savings of a married woman's separate estate, like the income itself, become her separate estate in equity.

Furniture was settled upon a married woman to her separate use, and with money also her separate property she from time to time renewed such as wore out. The whole were seized by the sheriff for a debt of her husband:—

Held, that, as a Court of equity would under the circumstances have restrained the sheriff from selling the accretions as well as the original furniture, a Court of law, upon an interpleader summons, must take notice of the equitable claim of the wife's trustee, and direct the sheriff to withdraw.

RILEY CARR, of Sheffield, by his will dated the 11th of March, 1865, left certain household furniture and effects to trustees in trust to permit his daughter Mary, the wife of Thomas Frederick Cashin, to have the use and benefit thereof during her life, and independently of her said husband and of his control, debts, or engagements; and he directed that, upon making the division of his trust estate, or in estimating the share thereof thereinafter

(1) E. B. & E. 485.

given to or in trust for his said daughter Mary and her children under the trusts of his will, the said household furniture and effects should be taken at the amount of the valuation thereof to be made by some competent valuer to be named by his trustees as part of the share of his daughter Mary and her children of and in his said trust estate, and that, upon her death the same household furniture and effects should be sold and the proceeds arising therefrom should be subject to the same trusts and powers in all respects as were thereinafter declared concerning the other part of the share of his said daughter Mary and her children of and in his said trust estate.

The testator divided his property into eleven shares; the share of his daughter Mary being left in trust for her for her life, free from the debts, control, and engagements of her husband, and after her decease to be equally divided amongst her children.

The household furniture and effects now in the house occupied by Mrs. Cashin, and which was rented by her in her own name, were, with the exception of a few renewals and additions which she had made thereto, the same as those mentioned in the will of the said Riley Carr, and were subject to the trusts thereof. These renewals were few in number, and had been made from time to time by Mrs. Cashin out of moneys coming to her and forming part of her own separate income under the trusts of the above-mentioned will, and paid to her by the trustee.

The sheriff having seized the furniture under a fi. fa. at the suit of the plaintiff, and the trustee claiming it, the sheriff took out an interpleader summons, which was heard before Brett, J., at Chambers, when an order was made upon the sheriff to withdraw from possession, and the matter referred to the Court, the claimant agreeing that, if the Court should be of opinion that the renewed articles were not within the trusts, he would give up such renewed articles to the execution creditor.

Lord having on a former day obtained a rule calling upon the trustee to shew cause why his claim herein should not be barred as to the renewed articles mentioned in the affidavit,

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French, shewed cause. In equity, the savings of a wife are as much her separate property as the corpus is: *Gore* v. *Knight* (1); *Humphrey* v. *Richards* (2); *Brooke* v. *Brooke* (3); "for, the sprout is to savour of the root, and to go the same way" (4); Davidson's Prec., 3rd ed., vol. 3, p. 104; Lewin on Trusts, 6th ed. p. 634; *Bird* v. *Pegrum*. (5)

[BRETT, J. The Court of Chancery would, no doubt, under such circumstances, restrain the sheriff from selling.]

A Court of law will always give effect to the wife's rights: *Jarman* v. *Woolloton* (6); *Haselinton* v. *Gill*. (7) *Messenger* v. *Clark* (8) at first sight looks adverse: but the Master of the Rolls explains it in *Brooke* v. *Brooke*. (9) Whatever notion may formerly have been entertained upon the subject, it is now clear that, upon an interpleader issue, a Court of law may take notice of equitable claims, and that a married woman may be party to an interpleader issue: *Shingler* v. *Holt* (10); *Rusden* v. *Pope* (11); *Bank of Ireland* v. *Perry*. (12)

Lord, in support of the rule. In the absence of any specific appropriation by the wife of her separate income, it becomes in law the property of the husband. In Bishop's Law of Married Women, § 820, it is said: "In a New York Case,"—*Shirley* v. *Shirley* (13),—"under the particular facts appearing, the Chancellor decided that 'the furniture purchased by the wife with the moneys received for the rents of her separate estate, and mixed with the other furniture of the husband, was also his property and liable to his debts; there being no agreement or understanding between them at the time of the purchase that such furniture should be kept by him as her trustee merely, or that the title thereof should be vested in any other person for her separate use.'" (14) The

(1) 2 Vern. 535.
(2) 2 Jur. (N.S.) 432.
(3) 25 Beav. 342.
(4) Per Lord Keeper Sir Nathan Wright, 2 Vern. 535.
(5) 13 C. B. 639; 22 L. J. (C.P.) 166.
(6) 3 T. R. 618.
(7) 3 T. R. 620, (*a*).
(8) 5 Ex. 388; 19 L. J. (Ex.) 306.
(9) 25 Beav. at p. 347.
(10) 7 H. & N. 654; 30 L. J. (Ex.) 322.
(11) Law Rep. 3 Ex. 269.
(12) Law Rep. 7 Ex. 14.
(13) 9 Paige, 363.
(14) But see § 818.

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Court of Chancery would not grant an injunction upon such an affidavit as here. There is nothing to shew that the renewed chattels were ever intended to vest in the trustee.

[BRETT, J. The house was taken in the wife's name. She did not give the money to her husband, but bought with it new furniture to replace the old.]

Bird v. *Crabb* (1), *Bird* v. *Pegrum* (2), and *Carne* v. *Brice* (3) are strong authorities to shew that the wife had no property in the goods in question. In the last-mentioned case it was held that the property in wearing apparel bought for herself by a wife living with her husband, out of money settled to her separate use before marriage, and paid to her by the trustees of the settlement, vests by law in the husband, and is liable to be taken in execution for his debts. *Roach* v. *Wright* (4) is a strong authority to shew that, under the Interpleader Act, equitable claims cannot be considered: and Bramwell, B., expresses himself strongly to the same effect in *Bird* v. *Crabb.* (1)

[BRETT, J., referred to *Frost* v. *Heywood.* (5)]

BRETT, J. I am of opinion that this rule should be discharged. It seems to me that we must take the facts to be, that furniture was settled upon the wife, by the will of her father, for her separate use, and that certain money was also settled upon her, the income of which was to be paid to her for her separate use, that the wife kept possession of the furniture, and, with a view of preserving her rights, a house was taken in her own name; so that, although the husband had the use of it, still the furniture remained to her separate use; and, as it from time to time wore out, when she received her income, instead of applying it to general household purposes, she bought with it new furniture to replace the old, which she continued to enjoy in the same way. Now, I will not undertake to say whether or not, if there was any dealing with this newly bought furniture, the Court of Chancery would cast any duty upon the trustee as to that. But the cases

(1) 30 L. J. (Ex.) 318.
(2) 13 C. B. 639; 22 L. J. (C.P.) 166.
(3) 7 M. & W. 183.
(4) 8 M. & W. 157.
(5) 2 Dowl. N. S. 801.

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cited shew that, in the event of any dispute, the Court of Chancery would have treated it as being the separate property of the wife, and, if claimed by a creditor of the husband, a Court of equity would have restrained a sale, on the ground that in equity it was the furniture of the wife and not of her husband. That being so, the sheriff has under a fi. fa. against the goods of the husband seized this furniture. The trustee comes forward and claims it, and the sheriff has taken out an interpleader summons, which has been referred to the Court. The question raised is whether under these circumstances the judge had a right to order the sheriff to withdraw, without directing an issue. Now, I decline to say whether this furniture became in law the property of the trustee. Be that as it may, I base my judgment on the fact that in equity the furniture in question is the wife's and not the husband's. For the purpose of to-day, I will assume that the trustee could not maintain an action at law for it. It was formerly supposed that the Courts of law, in dealing with questions arising under the Interpleader Act, could not take notice of equitable claims; and there is in *Rusden* v. *Pope* (1) the strong authority of Bramwell, B., that that is so: but the rest of the Court thought otherwise; and the preponderance of authority seems to me to establish that, where an interpleader issue has been ordered upon a sheriff's summons, when the whole subject-matter is before the Court, the Court will entertain the equitable claims of a third person. *Rusden* v. *Pope* (1) is an authority for that; and it seems to have been adopted in *The Bank of Ireland* v. *Perry*. (2) And in *Frost* v. *Heywood* (3) there are strong expressions of the Court to the same effect. Now, if the Court would do that after the granting of an interpleader issue, the question is whether a judge at Chambers may not deal with the matter in the same way. If he may not, but is bound to grant an issue, and the Court after the trial of the issue would not hand over the money or the goods to the execution-creditor, the granting of the issue will be a mere idle ceremony. I therefore think the judge at Chambers may deal with the equitable right, and on such right being made

(1) Law Rep. 3 Ex. 269. (2) Law Rep. 7 Ex. 14.
(3) 2 Dowl. N. S. 801.

out to his satisfaction may order the sheriff to withdraw. It was not necessary to order an issue or to drive the claimant to a Court of equity. The matter was referred to the Court in order that it might be more fully considered. I think the rule to order the sheriff to withdraw and that the claim be barred should be made absolute.

DENMAN, J. If this case had involved the right to property of any considerable amount, and the claimant was now for the first time coming before a judge at Chambers to raise this question, there might be a difficulty in laying down exactly what were the relative rights of the wife's trustee, the husband, and the creditor, and the judge might well have hesitated as to the course which he ought to pursue. There has been much conflict of opinion as to how far equitable rights are to be considered upon an interpleader summons. But the present case does not come before us in that shape. The sheriff has seized certain furniture under a fi. fa. As to the greater part of the property seized there is no doubt; it admittedly belongs to the trustee of a married woman. As to other part (of small value), it seems that the goods were purchased with money which was the separate income of the wife, and were placed in a house which was taken in her name. Nothing is stated as to the extent to which the husband used these goods. When the case came before the judge at Chambers, the condition of things was as if all parties desired the judge to decide the matter finally; and the Court now stands in the place of the judge. That being so, every rule which is applicable to the trial of an interpleader issue is applicable to this case; consequently, all the latitude allowed to the Court in *Shingler* v. *Holt* (1) and other cases where an execution creditor has not been permitted to set up the jus mariti in his own favour must be allowed here; and we have to say what are the real rights as between husband and wife under circumstances such as are disclosed here. I can entertain no doubt, after the cases cited by Mr. French, that a Court of equity would hold that the goods now in question were the goods of the wife and not of the husband. The case of *Shingler* v.

(1) 30 L. J. (Ex.) 322.

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Holt (1) shews how far a Court of law will recognize equitable claims.

HUDDLESTON, J. I am of the same opinion. Had this matter come before me at Chambers, I should have been quite prepared to act upon the case of *Jarman* v. *Woolloton*. (2) There, a woman before marriage, with the consent of her intended husband, conveyed all her stock in trade and furniture to trustees, to enable her to carry on her business separately. For some time after the marriage the wife carried on her trade in W. Street separately from her husband, who was a linen-draper in M. Street: but latterly all her effects were removed to his house, and she carried on her trade in a separate apartment there. The husband paid the rent of the house: but there was contradictory evidence as to the manner of the wife's carrying on her business, whether for her own separate use or not. The jury found that the business was not carried on by the wife separately, and they gave a verdict for the defendants (the assignees of the husband) as to the stock in trade, and for the plaintiff (the wife's trustee) in respect of the furniture; and the Court sustained the verdict, upon the authority of *Haselinton* v. *Gill*. (3) There, thirty-two cows and a bull, and the increase and produce to arise therefrom, were conveyed by settlement to trustees in trust to permit the wife, or such person as she should by will appoint, to keep and enjoy and at her or their will to sell and dispose of the said cows, &c., and of all the increase and produce to arise and be produced from the same, for her and their own proper use. The defendant, as sheriff, seized under an execution against the husband (after notice of the settlement) eight cows and one heifer, four of which were part of the cattle the subject of the settlement, and the rest of them bought with money produced by the sale of the milk of the cows mentioned in the settlement. Under the direction of the learned judge, the jury found for the plaintiffs (the trustees), subject to the opinion of the Court of Queen's Bench upon a special case; and upon argument there was judgment for the plaintiffs. Lord

(1) 30 L. J. (Ex.) 322.
(2) 3 T. R. 618.
(3) Before Buller, J., at Guildhall after E. T. 1784, 3 T. R. 620 (*a*).

Mansfield there said: "By the common law the wife can have no property during the coverture, but all her estate is vested in the husband. But Courts of equity have for ages past thought the rules of the common law too hard, and have thought it right to protect the property of the wife from the extravagance of the husband, in cases clear of fraud. This is done by the intervention of trustees; and thus far the wife is to all intents and purposes a single woman: and, wherever the trust can be supported in equity, this Court will consider the trustee entitled at law." Ashhurst, J., said: "The possession alone of the wife does not make this transaction fraudulent; for, it was consistent with the deed of settlement; and that gave the trustees as much interest in the produce as in the original property: the wife was the agent of the trustees in the new purchase." And Buller, J., added: "If the possession be inconsistent with the conveyance, that is evidence of fraud. But here the possession is consistent with the deed, by which the wife was to use the cows and to make a profit of them. There is no other circumstance to shew fraud as to the first cows; and, as to the produce, it is the same as if the wife had paid the money over to the trustees and they had bought the other cows, for, she acted as their agent." So, here, if necessary, I would infer that the wife purchased the renewed furniture as agent of the trustee. But it is not necessary to go so far. I agree that in dealing with the Interpleader Act, we may give effect to equitable rights. The result will be that the sheriff is ordered to withdraw; no action, and no costs.

Rule absolute.

Attorney for execution creditor: *D. W. Pearce.*
Attorneys for claimant: *M. Bradford & Co.*

1875
April 26.

BROWN AND OTHERS *v.* THE POWELL DUFFRYN STEAM COAL COMPANY.

Charterparty, Construction of—Master signing Bills of Lading for more Goods than put on Board—Bills of Lading Act, 18 & 19 *Vict. c.* 111, *s.* 3.

By a charterparty for the conveyance of a cargo of coal from Cardiff to Buenos Ayres, it was stipulated that the master should "sign bills of lading for the cargo put on board as presented to him by the charterers, without prejudice to the terms of the charterparty." On arrival at the port of discharge, it was found that the coal delivered to the consignees was less by thirty-two tons than the quantity mentioned in the bills of lading, and the owners were called upon to pay, and paid, the difference of value to the consignees.

In an action by the owners against the charterers to recover the amount so paid:—

Held, that, inasmuch as the owners were under no legal liability, either at common law or under the Bills of Lading Act, to pay for such deficiency, the action was not maintainable.

A ship-owner is not estopped by the signature of the bill of lading by the master from shewing that the goods or some of them were never actually put on board.

THE first count of the declaration stated that the plaintiffs and the defendants agreed by charterparty that the plaintiffs' ship, called the *Chagford*, then at Newry to discharge, should with all convenient speed sail and proceed to Cardiff, East Bute Dock, or Penarth Dock, at charterers' option, and there take on board, as tendered, a full and complete cargo of Powell Duffryn steam coal, which the charterers bound themselves to provide for shipment (certain accidents and events excepted), not exceeding what the vessel could reasonably stow and carry over and above her tackle, &c., and, being so loaded, should therewith proceed to Buenos Ayres or Rosario, one place, as ordered, on signing bills of lading, or so near thereunto as she might safely get, and deliver the cargo always afloat, alongside store or craft, steamer or depôt, wharf, or arsenal, as ordered, on being paid freight on the quantity delivered, at the rate of 37*s.* sterling per ton of 20 cwt. if for Buenos Ayres, of 42*s.* sterling per like ton if for Rosario, with 6*l.* gratuity in either case; the master paying dock and harbour dues, trimming, wharfage and keelage on cargo, consulages, lights, pilotages, and other port charges whatsoever, certain perils and casualties

excepted: the said freight to be paid, as thereinafter mentioned, on unloading and right delivery of the said cargo; sufficient cash for ship's ordinary disbursements, not exceeding one-third of the amount, to be advanced on signing bills of lading, less 6 per cent. for interest and insurance; sufficient cash for ship's disbursements to be advanced at the port of discharge, not exceeding one-third of the freight, and the remainder by approved bill upon London as aforesaid at three months date from the right delivery of cargo: the master of the said ship to sign bills of lading for weight of the said cargo put on board, as presented to him by the defendants, without prejudice to the tenor of the said charterparty, within twenty-four hours after the said coals should have been put on board, or pay 4*d.* per registered ton per day for each day's delay: that the ship sailed to Cardiff aforesaid, and was there loaded by the defendants with a cargo consisting of a certain quantity, that is to say, 573 tons of Powell Duffryn steam coal: that, although all things were done and happened and all times elapsed necessary to entitle the plaintiffs to maintain this action in respect of the several breaches hereinafter mentioned,—yet, for a first breach, the plaintiffs said that the defendants presented to the master of the said ship for his signature, and caused and procured him to sign, certain bills of lading for the said cargo for a weight greatly exceeding the weight so put on board as aforesaid, that is to say, for 605 tons, whereby the plaintiffs were rendered liable to pay and were forced to pay to the consignees of the said cargo at Buenos Ayres 31*l.* as and for the value of the difference between the said 605 tons mentioned in the said bills of lading and the said 573 tons so shipped as aforesaid, and a further sum of 13*l.* for dock and other dues and charges in respect of the said difference: and, although the said ship was ordered to carry and carried the said agreed cargo in the said ship to Buenos Ayres aforesaid, and there unloaded and made right delivery of the said cargo according to the terms of the said charterparty, and although the said freight amounted in the whole to 1119*l.*, whereof a certain part was advanced according to the terms of the charterparty, yet the remainder of the said freight was not paid by such bills as in the charterparty mentioned, nor at all, and the same was wholly due and unpaid.

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Demurrer, on the ground that the first breach assigned was not a breach of the terms of the charterparty.

Lumley Smith, in support of the demurrer. By the terms of this charterparty the master was to sign bills of lading for weight of the cargo put on board, as presented to him by the defendants, without prejudice to the tenor of the charterparty: and the defendants caused the master (not fraudulently or even knowingly) to sign bills of lading for a weight exceeding the weight put on board. Now, the owners clearly are not bound by the signature of the master to bills of lading for goods not actually received on board: *Grant* v. *Norway* (1); *M'Lean* v. *Fleming*. (2) The shipowners, therefore, were not liable for the payments they have made to the consignees, and consequently cannot recover them from the charterers. The master possibly might have been personally liable to the consignees under s. 3 of the Bills of Lading Act, 18 & 19 Vict. c. 111. (3) But there is nothing in that Act to charge the owners. In *Jessel* v. *Bath* (4), which was an action by the assignee of a bill of lading signed by the agents of the charterers for a larger quantity of manganese than had actually been shipped by them, Bramwell, B., said (5): "At common law, the defendants would not be liable on this bill, because, although Messrs. Barchi were their agents to conduct their business, they were not their agents to make an admission contrary to the fact, by signing a bill of lading for a quantity they knew nothing of. Then, does the statute make any difference? I think not: it seems to me only to mean that the person actually signing the bill

(1) 10 C. B. 665; 20 L. J. (C.P.) 93.

(2) Law Rep. 2 H. L., Sc. 128.

(3) 18 & 19 Vict. c. 111, s. 3: "Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by shewing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder or some person under whom the holder claims."

(4) Law Rep. 2 Ex. 267.

(5) Law Rep. 2 Ex. at p. 274.

of lading shall be liable. If, for instance, an owner had signed, it would be conclusive against him, but it would not be so against the other owners. If, then, the bill of lading is only conclusive against the person actually signing, the defendants, not being the signers of the bill in question, are not made liable by the statute."

F. M. White, contrà. There is an implied contract on the part of the charterers that they will insert in the bills of lading the right quantity of cargo put on board; and there is a special provision in this charterparty, whereby the owners contract that their agent (the master) shall sign bills of lading for weight of the cargo put on board, as presented to him by the charterers, without prejudice to the tenor of the charterparty. The bill of lading so signed is primâ facie conclusive as to the weight put on board. A burthen is cast upon the ship-owners by this clause; and a corresponding obligation is cast upon the charterers to indemnify them for so signing.

[BRETT, J. By the charterparty, the freight is to be paid on the amount of coal delivered at Buenos Ayres. It is quite immaterial to the ship-owners what may be the quantity mentioned in the bill of lading.]

The words "without prejudice to the charterparty" are not introduced into the bills of lading. It may be that the obligation of the ship-owner is limited in this country to the quantity actually shipped; but it may be that their obligations may be more extensive in a foreign country.

Lumley Smith was heard in reply.

LORD COLERIDGE, C.J. I am of opinion that our judgment should be for the defendants. The declaration is upon a charterparty, between the owners of the ship and the charterers, which provided that the ship should take on board at Cardiff a full cargo of coal, and proceed therewith to Buenos Ayres, and there deliver the same on being paid freight on the quantity delivered; and containing the following stipulation:—"The master of the said ship to sign bills of lading for weight of the said coals put on board, as presented to him by the defendants, without prejudice to the tenor of the said charterparty." The declaration then avers

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that the ship proceeded to Cardiff and was there loaded by the defendants with 573 tons of coal, and assigns for breach that the defendants presented to the master for his signature, and procured him to sign, bills of lading for a weight greatly exceeding the weight so put on board, viz. 605 tons, in consequence of which the plaintiffs were rendered liable and obliged to pay to the consignees at Buenos Ayres 31*l.*, the value of the difference between the 605 tons mentioned in the bills of lading and the 573 tons actually shipped, and 13*l.* for dues and charges in respect of such difference of quantity. The plaintiffs seek to recover these two sums. The defendants demur to this declaration, and say that the plaintiffs were not bound to pay to the consignees the value of the difference between the coal mentioned in the bills of lading and that delivered. Upon the authorities, and particularly the case of *M'Lean* v. *Fleming* (1), it seems to be clear that, if an action had been brought against the ship-owners, they would not have been precluded from shewing the fact, and would only have been bound to deliver the quantity which was actually put on board. It has been contended on the part of the plaintiffs that by express stipulation they have impowered the master to bind them contrary to the general rule of law. But that is not the true construction of the clause in the charterparty. It does not impower the master to do anything more than he is bound under an ordinary charterparty to do, viz. to bind himself, leaving it open to the ship-owners to dispute that which his signature attests, if contrary to the fact. Therefore the defendants were entitled to say that the defence was open to the ship-owners at Buenos Ayres. The demurrer must prevail.

BRETT, J. I am of the same opinion. This is an action by ship-owners against charterers for breach of a contract contained in the charterparty. The alleged ground of action is that the charterers presented to the master for signature bills of lading which described the weight of coal put on board as being greatly in excess of that which was actually loaded. No fraud or knowledge on the part of the defendants is alleged. The ground of the action is the breach of a supposed warranty that they would not

(1) Law Rep. 2 H. L., Sc. 128.

in the bill of lading misrepresent the quantity delivered. Now, the mere breach of warranty would lead only to nominal damages. But the plaintiffs insist that they are entitled to substantial damages in this case, because by the terms of the bills of lading they would be bound to deliver to the consignees the weight of coal specified therein; and would be, or had been, forced to pay damages to the consignees for not having delivered such full weight. Now, there is no express warranty: the question is whether there is an implied one. It is suggested there is, because by the terms of the charterparty it must have been obvious to both parties that the liability of the ship-owners to the consignees would be regulated by the bills of lading. No such warranty, however, can arise as between the defendants and the plaintiffs, the ship-owners, inasmuch as the ordinary law would oblige the master to sign bills of lading; and, if he signs for a greater quantity of goods than is put on board, *M'Lean* v. *Fleming* (1) shews that the owners are not bound to deliver more than the real quantity shipped. But it is suggested by Mr. White that the obligation of the owners might be more extensive abroad,—that the consignees there might have different rights from consignees here. The rights of the consignees, however, must depend upon the bill of lading. That is a contract made in this country, and by the comity of nations its construction would be regulated according to the law of this country. We must therefore assume that this is so inasmuch as the contrary is not alleged: consequently there is no foundation for Mr. White's argument. I was at first struck by the suggestion that the absence of liability on the part of the ship-owner is in ordinary cases founded upon the absence of authority of the master to sign bills of lading as here. I agree that, as between the ship-owners and the charterers, the master was authorized to sign bills of lading without requiring the coals to be weighed,—to sign according to the weights presented to him. But the charterparty freight or the obligation of the owners to deliver does not depend upon the assertion contained in the bill of lading. It occurred to me that the Bills of Lading Act might have made some difference in this respect: it provides, in s. 3, that "every bill of lading in the hands of a consignee or

(1) Law Rep. 2 H. L., Sc. 128.

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indorsee for valuable consideration representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same:" and, inasmuch as the ship-owners here authorized the master to sign an unusual bill of lading, it might be considered that the signature of the master was their signature. I do not understand the judges in *Jessel* v. *Bath* (1), when they say that the bill of lading binds only the person who actually signs it, to mean that it must be the manual signature of the party, because, if a man authorizes another to sign his name, he is equally bound as if he had signed it himself. But the authority given to the master here was, not to sign the name of his owners, but to sign for himself, though to sign an unusual bill of lading. The statute means, I think, the signature of the name of the person who is intended to be bound. It seems to me, therefore, that, although the plaintiffs authorized the master to sign these bills of lading, there is no estoppel as between them and the consignees either at common law or by the statute, and no binding of them by the bill of lading; and that they were not bound to deliver to the consignees a greater amount of cargo than they actually received on board. Upon the true construction of this charterparty, therefore, there was no such express or implied warranty as has been contended for.

DENMAN, J. I am not at all sure that the point which has been the most argued before us was that which was intended to be raised by this demurrer. I cannot help thinking that it was intended to raise an objection which goes further back. The first breach (which alone is demurred to) is founded upon these words in the charterparty—"The master to sign bills of lading for weight of the said cargo put on board, as presented" (perhaps, strictly speaking, "represented" would have been the better word) "to him by the defendants, without prejudice to the tenor of the said charterparty": and the breach is that "the defendants presented to the master for his signature, and caused and procured him to sign, certain bills of lading for the said cargo for a weight greatly exceeding the weight so put on board." The contract was that

(1) Law Rep. 2 Ex. 267.

the master should sign only for such cargo as was actually shipped. The declaration charges the defendant with not having done that which they never promised not to do, viz. make a mistake. I therefore think the breach is bad, and the defendants must have judgment.

Judgment for the defendants.

Attorneys for plaintiffs: *Webb & Pearson, for Oliver & Botterill, Sunderland.*

Attorneys for defendants: *Ingledew, Ince, & Greening.*

IN RE WILLIAM SAYER.

May 8.

Attorney—Stamping Articles of Clerkship—Computation of Service.

The Court will allow the service under articles of clerkship to be computed from their date, notwithstanding the stamp-duty thereon has not been paid within the proper period, provided the failure to pay it has arisen from some unforeseen circumstance over which the party had no control.

Therefore, where the failure had arisen from the non-payment of a debt due to the clerk, which he had a reasonable expectation to obtain in time, the excuse was held sufficient.

Por 1641, 3

IN Hilary Term, 1870, William Sayer passed the preliminary examination, and obtained the necessary certificate, with the intention of being articled to a solicitor, his mother then having the money (which she would have given him) to pay the stamp-duty on his articles; but shortly after this he was engaged as secretary and travelling companion to his cousin, at a certain salary, and he remained with him in that capacity until February 1874, when he was discharged, his cousin owing him 215*l.* for salary, &c. In March, 1874, his cousin, having no further need of his services, recommended him to article himself to an attorney, and promised to pay the stamp-duty on his articles. Relying upon this promise, Sayer, on the 2nd of May, 1874, entered into articles of clerkship with Mr. Moseley, of Great Yarmouth. The articles were executed without being stamped, solely in consequence of the cousin's failure to perform his promise, and of the inability of the clerk's mother then to assist him; and ultimately he was compelled to sue his cousin for the debt due to him, but did not recover the money

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until March last, when the stamp-duty and penalty were immediately paid.

Upon an affidavit of these facts, and further stating that the applicant was unable to pay the duty within six months of the execution of his articles, solely on account of the non-fulfilment of his cousin's promise, and the non-payment of his claim, and that the non-inrolment of his articles did not arise from any neglect or default on his part,

May 8. *Channell* moved that the service of Sayer under his articles might be computed from their date. An application had already been made to Blackburn, J., and refused. The rule to be deduced from the cases of *Re Breden* (1) and *Re Blades* (2) is, that, to warrant an application of this sort, the Court must be satisfied that the omission to pay the duty at the proper time was the result of an unforeseen emergency, and that the inability did not arise from the mere disappointment of some vague expectation upon which the applicant was not justified in relying.

[ARCHIBALD, J. I understand the rule to be this, that, if any satisfactory reason be given for not paying the duty at the proper time, and it is shewn that the applicant was prevented from doing so solely by causes over which he had no control, the Court may relax the rule.]

The present application clearly falls within that principle. The applicant had a reasonable expectation of being provided with funds in sufficient time, but he was prevented by the default of his debtor and the law's delay.

LORD COLERIDGE, C.J. I am of opinion that the order should go upon the same terms as those imposed in *Re Blades* (2), viz. that the service of the applicant be computed from the date of the execution of the articles; that he present himself for the intermediate examination to be held next term; that notice of the application be given to the Incorporated Law Society, and the affidavits used in support of the motion laid before them; that the rule be not drawn up until after four days have elapsed from the service of the notice upon the society; and that an affidavit

(1) 12 C.B. (N.S.) 351; 31 L. J. (C.P.) 321. (2) 44 L. J. (C.P.) 115.

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of the service of the notice and affidavits upon the society be produced to the master on drawing up the rule. The order in that case having been made on the authority of the united judgment of this Court and the Court of Queen's Bench in *Re Breden* (1), I cannot entertain any doubt that it was rightly made.

ARCHIBALD, J., concurred.

Rule accordingly.

Attorneys for applicant: *Taylor & Ward.*

THE ANGLO-EGYPTIAN NAVIGATION COMPANY *v.* RENNIE AND ANOTHER.

May 13.

In this case, which is reported ante, p. 271, the plaintiffs brought error to the Court of Exchequer Chamber. The case came on for argument on May the 13th, before Cockburn, C.J., Bramwell, B., Blackburn and Mellor, JJ., and Cleasby and Amphlett, BB. After hearing the argument for the plaintiffs, and part of the argument for the defendants, the Court pointed out, that assuming the judgment of the Court below to be erroneous with regard to the question whether the property in the boilers had passed to the plaintiffs, and that the property had so passed, even then there still remained the question whether the defendants were entitled to a lien on the boilers for any sum of money in respect of their price over and above the sums of money already paid by the plaintiffs to the defendants, which was a question of some doubt and difficulty. They, therefore, suggested, that under all the circumstances of the case, it was one which would be most satisfactorily disposed of by arbitration. In this suggestion the parties acquiesced, and consequently no judgment was given.

(1) 12 C. B. (N.S.) 351; 31 L. J. (C.P.) 321.

END OF EASTER TERM, 1875.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

TRINITY TERM, XXXVIII VICTORIA.

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CHATTERTON AND ANOTHER *v.* CAVE.

Dramatic Copyright—Infringement, what amounts to—3 & 4 *Wm.* 4, *c.* 15, *s.* 2.

To constitute an infringement of dramatic copyright under 3 & 4 Wm. 4, c. 15, s. 2, a material and substantial part of the plaintiff's dramatic production must be pirated. Though an appreciable part be taken, it does not follow as a consequence of law that the plaintiff's right is infringed, if such part be of a very unessential nature, or very unimportant and trifling in relation to the effect of the whole composition.

Affirmed 2 C P D 48. C.A. 4 H & N 138 affd. H.L.

DECLARATION by the plaintiffs, as duly registered assignees of the sole right and liberty of representing at any place or places of dramatic entertainment in any part of the United Kingdom a dramatic production and piece called the Wandering Jew, which said production and piece had been composed by one Leopold David Lewis, after the passing of 3 & 4 Wm. 4, c. 15 (The Dramatic Copyright Act), complained that the defendant wrongfully represented, and caused to be represented, without the consent of the plaintiffs in writing, or otherwise, at certain places of dramatic entertainment, the said dramatic production or piece, and divers

parts, scenes, play and dramatic business of the same; and claimed the penalties of 40*s.* for each representation payable under the statute.

Second and third counts substantially similar to first count.

Plea (inter alia), not guilty.

Issue.

The trial took place before Lord Coleridge, C.J., at the Middlesex Sittings after Trinity Term, 1874, when the following facts appeared:—It was proved that there was a dramatic version of the Wandering Jew in French. The plaintiffs were the assignees from the author of an English drama called the Wandering Jew, which was a translation or adaptation taken from the French drama. The defendant also had brought out an English drama called the Wandering Jew, the representation of which was the alleged infringement of the plaintiffs' copyright.

By agreement between the parties, it was arranged that the jury should be discharged, and the Lord Chief Justice should read the original French version and the two plays, and order how the verdict should be entered, leave being reserved to either party to move on any point of law that might arise on the judge's finding.

The Chief Justice found that two scenes or points of the drama of the defendant had been taken from the plaintiffs' drama, without recourse to either the French novel or the French drama, originals common to the dramas of both plaintiffs and defendant. He found this in respect of the final scene of the defendant's drama, and of the appearance of the Wandering Jew, and the stage business connected with that appearance, to be found in the second scene of the second act of the defendant's drama and the fourth scene of the first act of the plaintiffs' drama. He found that the drama of the defendant was not, except in these respects, a copy from, or colourable imitation of, the drama of the plaintiffs. He directed the verdict to be entered for the defendant; and if, upon argument, the Court should think the verdict ought to be entered for the plaintiffs, he assessed the damages at 40*s.*

A rule nisi was obtained in pursuance of the leave reserved to enter the verdict for the plaintiffs for the damages assessed by the Lord Chief Justice upon his findings, on the ground that he ought

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to have entered the verdict for the plaintiffs, as he found representation by the defendant of a part of the plaintiffs' play.

The facts with regard to the points in which the Lord Chief Justice found that the defendant's drama was taken from the plaintiffs' were as follows:—

In the fourth scene of the first act of the plaintiffs' drama the Wandering Jew was represented, in the course of his wanderings, as having reached the Arctic Regions (the scene being lit up with lime light, and the stage covered with icebergs), and, whilst there, beholding a vision shewing the dangers and sufferings to which were exposed certain of his descendants, whose history formed the subject of the drama. In the second scene of the second act of the defendant's drama the Wandering Jew was also represented as being in an icy region, and beholding a vision of his descendants exposed to peril. In the prologue of the French drama, from which both the plaintiffs' and the defendant's dramas were taken, the Wandering Jew was represented, in a similar manner, as watching over the fortunes of his descendants, but the representation of this idea formed no part of the body of the drama. In the last scene of the plaintiffs' drama the descendants of the Wandering Jew, upon whose fortunes the drama turns, were represented as finally triumphant over the machinations of their enemies, and the scene closed with an appearance of the Wandering Jew at the back of the stage, lighted up by red lime light. Similarly, in the last scene of the defendant's drama, there was an appearance of the Jew at the back of the stage, beholding the final good fortune of his descendants. In the epilogue of the French drama there was a tableau called the "apotheosis" of the Jew, representing the termination of the Jew's wanderings, and his ultimate salvation at the day of judgment. The end of the French drama differed from that of the English dramas inasmuch as, in the former, the fate of the Jew's descendants was adverse instead of prosperous.

D. Seymour, Q.C., and *Lumley Smith* shewed cause.

Day, Q.C., and *Poulter* supported the rule.

The substance of the arguments, and the authorities relied on, which are material to the point here reported, sufficiently appear from the judgments.

BRETT, J. This rule was moved on the ground that the Lord Chief Justice had entered the verdict wrongly in point of law upon the findings of fact. I am of opinion that this was not so, and that the rule should be discharged. The action was brought for infringement of the plaintiffs' rights under 3 & 4 Wm. 4, c. 15. The Lord Chief Justice found that the defendant had in fact copied two points or scenes from the play, the right of representing which was the property of the plaintiffs, but notwithstanding that he entered the verdict for the defendant. The ground upon which he did so was that, though two points had been copied, they were neither material nor substantial parts of the plaintiffs' play. The question, therefore, that arises is, what is the proper definition of an infringement of dramatic copyright? When there is a taking of what must be admitted to be appreciable parts of the plaintiff's drama, is the plaintiff necessarily entitled to a verdict in point of law? Or if the jury may properly find, and have found, that the parts so taken, though appreciable, are in point of quantity or quality not material or substantial, is the result that there is no infringement of copyright? It seems to me that unless there is a taking of a material and substantial part there is no infringement of copyright. It is true that the question under the 2nd section is not only whether the whole production has been copied, but also whether a part has been copied; but I think that by a part the section must mean a material and substantial part. The authorities seem to bear out this conclusion. In *Bramwell* v. *Holcomb* (1) Lord Chancellor Cottenham uses these expressions: "When it comes to a question of quantity it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, that is always looked to. It is useless to refer to any particular cases as to quantity." He, therefore, says that though the quantity copied may be small, it may be so material as to be a substantial part; but this obviously shews that the question of the value and quantity of the part is to be considered. In *Pike* v. *Nicholas* (2) the judgment of the Lord Chancellor and Giffard, L.J., overrules that of James, V.C., on a question of fact, but the proposition of law laid down

(1) 3 My. & Cr. 737. (2) Law Rep. 5 Ch. 251.

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by him is not questioned. The way he put the law was thus: "The plaintiff, therefore, has a right to say that no one is to be permitted, whether with or without acknowledgment, to take a material and substantial portion of his work, of his argument, his illustrations, his authorities, for the purpose of making or improving a rival publication."

This shews that there must be a taking of a substantial part, and that the taking of an infinitesimal part would not be sufficient. So in *Bradbury* v. *Hotten* (1) Kelly, C.B., lays down the same rule. He says: "If they have been so copied as to amount to a material part of the plaintiffs' publication, then there has been a piracy for which the defendant is responsible. It is said that to copy a single picture, at all events, could not be an infringement of the plaintiff's copyright, but it is impossible to lay that down as a general rule. I can easily conceive a case where such an act would not be piracy." Therefore it seems to me it would be a proper direction to a jury in the case of an alleged infringement, that if they thought that, although a part had been taken, such part was not a material or substantial part, they might find there was no infringement. The question, then, that remains in the present case is, whether a jury could properly find that the parts copied were not material or substantial? That question is complicated in the present case by the fact that there was here a French drama, from which both the plaintiffs' assignor and the defendant might legally copy in this country. The plaintiffs' assignor copied a good deal of this drama, and added in the adaptation of it certain innovations of his own. The first point where my Lord has found that there was a copying of the plaintiffs' drama by the defendant is in the second scene of the second act. The question is how much the defendant has copied. The idea on which both the dramas are based in this point is to be found in the original French drama. The Jew is represented as relegated to some extreme northern region of the earth, and there witnessing a vision of the fortunes of his descendants. That idea was plainly taken from the French play, but the plaintiffs' author, in introducing it into his drama, carried it out in a somewhat different way from the French dramatist: the dramatic situation was not the same. The defend-

(1) Law Rep. 8 Ex. at p. 5.

ant may be said, I think, to have taken the idea from the French drama, but he has copied the mode of representing the idea, or the theatrical situation, from the plaintiffs' drama. Then, not having copied the idea or the language from the plaintiffs' drama, but only the dramatic situation, does it necessarily follow that the defendant has taken a substantial or material part of the plaintiffs' drama? I think not. I think it may be that, under the circumstances of the case, the idea was the principal matter, and the mode of representing it an immaterial part. The other point was the final appearance of the Jew in the last scene. As to this I have more doubt. A more considerable part of the plaintiffs' drama was taken in this case. But here again, on the whole, I come to the conclusion that it may be said that no such material or substantial part was taken as to constitute an infringement of copyright. In the epilogue of the French play the Jew appears for the last time, and the idea there is that after the terrestrial fortunes of his descendants have been finally settled, the Jew appears under a visionary aspect in a state of felicity. That occurs in the epilogue in the French play, and has been described as in the nature of an apotheosis of the Jew at the day of judgment. The idea is carried out in both the English dramas, but instead of occurring in an epilogue, it is made part of the last scene, and there is no suggestion of the day of judgment. I think the part taken here is more considerable, but still I think it would be fairly open to a jury to come to the conclusion that the main idea being taken from the original French drama, and the defendant not having copied the idea or the language from the plaintiffs' drama, but only the mere dramatic situation, there was no such material or substantial part of the plaintiffs' drama taken as to amount to an infringement of copyright. For these reasons I think the rule must be discharged.

GROVE, J. I am of the same opinion. I think the true construction of the finding is that though two points of the defendant's drama were taken from the plaintiffs', these parts were not of a material or substantial character. If upon such a finding the verdict had been entered for the plaintiffs, and it had been contended for the defendant that there was no evidence of an infringe-

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ment of copyright to support the verdict, a question of law would have arisen; but though the case comes before us on leave reserved, as it has been argued, it seems to me to be rather in the nature of a question whether the verdict was against evidence: that is to say, whether the parts of the plaintiffs' drama taken by the defendant were such that a jury ought to say that they were material and substantial parts, and that there was, therefore, an infringement of copyright. In *Pike* v. *Nicholas* (1) the expressions used by James, V.C., in the passage my Brother Brett cited, were not used as any new exposition of the law, but as a statement of what was well settled in regard to such cases. It is assumed that to constitute an infringement of copyright there must be a taking of a material and substantial portion of the plaintiffs' work, just as in patent law to constitute an infringement there must be a taking of a material part of the patented invention. No authority has been cited to the contrary. The question, therefore, is, what amounts to a material and substantial part? It is impossible to give an exact definition. It is a question what constitutes the essence of the invention or work. It is not every minute element or incident of the work that amounts to a material or substantial part of it. With regard to these two scenes taken by the defendant, was there such an imitation by the defendant of an original idea or part of the plaintiffs' drama as to constitute an infringement of copyright? As to the first point, the scene, as existing in both the English dramas, seems really to be described in the prologue of the French play. The Jew is there described as being at Behring's Straits, and it is not denied that the scene is substantially the same in both dramas and in the prologue to the French play; but it is complained of that, whereas it is in the prologue in the latter, it is introduced in the defendant's drama as part of the play, as it is in the plaintiffs'. But it can hardly be said that the mere place in which the scene is introduced in the plaintiffs' play is part of the original idea or invention of the plaintiffs. With regard to the second point I have more doubt. It is a representation of the Jew after the dénouement of the drama. It occurs in the French play in what is called the epilogue, the play being in tableaux, and the seventeenth tableau being the "apotheosis" of the Jew. In the

(1) Law Rep. 5 Ch. 251.

English plays, the descendants of the Jew being assembled together giving thanks for their escape from peril and the success of their fortunes, the Jew appears at the back of the stage in a scene lighted up by lime-light looking up to heaven. Can the mode in which the plaintiffs' drama carries out the idea suggested in the epilogue to the French play be fairly called an original idea or production of the plaintiffs? I think not. In such cases it is reasonable to consider not only the identity of the two things, but how far there is any novelty in either of them: whether there is any taking of what may be called a new invention or idea. With regard to a mere stage effect, it is not because two persons use the same effect in different plays that there is an infringement of copyright. A very striking stage situation or important novel scenic effect might very well be, under some circumstances, the subject of dramatic copyright. But I see nothing of the sort here. The effect was an ordinary stage effect, such as every one familiar with melodramatic pieces constantly sees, and would expect at the termination of such a drama as this. The whole of the language of the defendant's drama being different from the plaintiffs', and the two versions being substantially independent, can it be said because in the last scene an expedient is adopted which is identical with that adopted by the plaintiffs' drama, but which may be said to be "common form" in all such plays, there is an infringement of copyright? I think this would be going too far. The intention is to protect original merit; it would be descending to absurdity to give protection to the application of a common-place expedient of scenic art to the end of a version of a drama. On the whole, I come to the conclusion that, though there was here a copying of two parts of the plaintiffs' drama, it was not a copying of material or substantial parts; no really valuable part of plaintiffs' production was taken, and consequently there was no infringement of copyright.

LINDLEY, J. I am of the same opinion. The finding is that the defendant's drama is in two parts a copy of the plaintiffs. The plaintiffs contend that from that fact, without more, they are entitled to succeed in an action for infringement of copyright. That contention is based upon the language of the 2nd section of

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the Dramatic Copyright Act. That section provides that if "any person shall, &c., contrary to the intent of this Act, or right of the author or his assignees, represent, &c., any such production as aforesaid, or any part thereof," &c. We have, therefore, not only to see whether the production, or any part thereof, has been represented, but also to consider what is the intent of the Act and the right of the author. Is the intent of this Act, and the right thereby conferred on the author, different from the intent of, and the rights conferred by, other Acts relating to copyright? To determine this, I think it is only necessary to look to the preamble of the Act, which describes its object as being to extend the provisions of former copyright Acts by giving protection to the right of representation of dramatic productions. It seems to me, having regard to the scope of the Act as it is to be gathered from the preamble and the body of the Act, that the intention was to give a right in respect of dramatic representations analogous to that given in respect of other matters the subject of copyright. It has been decided in various cases upon the other copyright Acts, which are collected in Mr. Copinger's book on Copyright, and of which I will only refer to the case of *Jarrold* v. *Houlston* (1), that to maintain an action for infringement of copyright it is necessary to prove that some essential part of the plaintiffs' work has been copied. It seems to me, therefore, that the finding of my Lord is fatal to the plaintiffs' right to succeed. And if we are to look into the question whether the finding was justified by the evidence, it appears to me that the evidence was quite sufficient to sustain it.

3 Jaff Co 488

LORD COLERIDGE, C.J. I concur in the opinion of the rest of the Court. What I meant to convey by my finding was that in two points or situations there had been an imitation of the plaintiffs' drama by the defendant. These points so copied were not parts of the dialogue or composition of the plaintiffs' drama, but were in the nature of dramatic situations or scenic effects. It appeared to me that, looking to the general character of the two dramas respectively, the extent to which the one was taken from the other was so slight, and the effect upon the total composition

(1) 3 K. & J. 708. 3 Jur. N.S. 1051

was so small, that there was no substantial and material taking of any one portion of the defendant's drama from any portion of the plaintiffs'. Therefore, though I felt bound to find that there was a taking of these two small points, I decided to enter the verdict for the defendant, and the question now is whether I was entitled to do so in point of law. I was much pressed, in considering this case, by the case of *Planché* v. *Braham* (1), which has always been treated as a binding authority on this subject. That was a case in which the actual plagiarism was very small. [His Lordship here detailed the facts of the case.] It was left to the jury by Tindal, C.J., at the trial, without much discussion, to say whether there had been a substantial infringement of the plaintiffs' right. The jury found that there had been. It must be taken upon the subsequent authorities that they found that the part taken was substantial and material. The question was in its nature one of fact, and the Court of Common Pleas afterwards refused to disturb their finding on such question. In that case, however, and in a variety of other cases, the question was treated as one of degree. It has never been laid down that the moment it is found that a particular appreciable portion of the plaintiffs' work has been taken, it follows as a necessary legal consequence that there has been an infringement of copyright. Tindal, C.J., says that it is difficult to say what amounts to a representation of part of a production. I agree with my Brother Lindley that the same principle must be applied with relation to an infringement of copyright under this Act as to other Acts relating to copyright. In *Bramwell* v. *Halcomb* (2) Lord Cottenham treated the question as one of degree. So, also, in *Bradbury* v. *Hotten* (3), Bramwell, B., says that there must naturally be doubt in cases on the border land between piracy and no piracy; and again, in *D'Almaine* v. *Boosey* (4), the Lord Chancellor says that, where material is borrowed from a previous work, it is a nice question, depending on circumstances, whether there is a plagiarism. All these authorities satisfy me that the answer to the question whether there has been an infringement of copyright does not follow as a necessary logical consequence from the mere fact of there having been a

3 Jeff & Co 485

(1) 4 Bing. N. C. 17.
(2) 3 My. & Cr. 737.
(3) Law Rep. 8 Ex. at p. 6.
(4) 1 Y. & C. 301.

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taking from a previous work, but that it is a question of fact and of common sense whether the part taken is of such a substance and value, or used in such a way, as to amount to an infringement of the plaintiffs' right. Here the plaintiffs' play was taken from a French original, and the plaintiffs would have a literary copyright in the translation and the right of representing it; but this could not prevent another person from going to the original and making another version, in which he also would have a copyright. The defendant had made what, in all but two points, was an entirely distinct and independent version of the original drama. The two points in question related to two appearances of the Wandering Jew. I must confess that there is a difficulty, to my mind, in referring the substance of the two points taken to the original French drama, as my learned Brethren have done. In the French drama these appearances of the Jew form part of the prologue and epilogue respectively, and have not much reference to the action of the drama. They are introduced into the English dramas more as part of the machinery or story of the play than in the French original. The end of the French play is quite different from that of the English, and the appearance of the Jew in the latter at the end of the play is connected with the alteration of the plot. I think that the idea of these appearances was not taken by the defendant from the French original, but from the plaintiffs' play. But, notwithstanding this, I think the effect of them is so very small on the total result of the play, and they form such an utterly unimportant part of the scenic representation as a whole, that the defendant's drama cannot be said to be taken in any material or substantial part from the plaintiffs'. The rest of the Court are also of opinion that the points taken are not sufficiently substantial to make it necessarily result, as a matter of law, that there was an infringement of copyright, and therefore the rule will be discharged.

Rule discharged.

Attorney for plaintiffs: *Chatterton.*

Attorneys for defendant: *Lewis & Lewis.*

WHITAKER *v.* FORBES.

1875
June 2.

Rent-charge—Action of Debt for Arrears—Venue.

An action of debt for arrears of a rent-charge upon land in Australia is not maintainable in this country.

Affirmed 2 Q.B.D. 51. C.A.

2 C.P.D. 39.

DECLARATION by the executor of William Forbes, the venue being laid in Middlesex, for that Louisa Forbes, deceased, by her will devised all her freehold and leasehold messuages, land, and hereditaments to the defendant during his life, subject nevertheless to and charged with an annuity of 500*l.* per annum, which she thereby gave to the said William Forbes, to be payable during the joint lives of the said William Forbes and the defendant, by equal quarterly payments on the 25th of March, 24th of June, 29th of September, and 25th of December in each year; that the said will was duly proved on the 20th of August, 1867, and the defendant thereupon entered into possession of and took the rents and profits of the said messuages, &c., in pursuance of the will and continued in such possession and receipt of the rents, &c., until action brought, and that the said rents and profits were in each year in excess of the said sum of 500*l.* charged upon the said messuages, &c., and all conditions, &c. were fulfilled to entitle the said William Forbes to payment of the said annuity. Yet the defendant did not pay the said annuity, and certain quarterly payments of the same became due from the defendant to the said William Forbes, and the defendant did not pay the same.

Plea stated that the said messuages, &c. in the said will mentioned, and of which the defendant took possession and received the rents and profits in the declaration mentioned, were situated in parts beyond the seas, to wit, in Australia.

Demurrer and joinder in demurrer.

West, Q.C. (*Willis* with him), for the plaintiff, contended that the action of debt for the arrears of the rent-charge would lie in this country.

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A. P. Stone, for the defendant, contended that the action of debt would not lie, and that the right of action depending upon privity of estate only, and not on privity of contract, the venue was local, and consequently the estate being in Australia no action could be brought in England.

West, Q.C., in reply.

[The following authorities were referred to in the course of the argument: 1 Wms. Saunders, 74, n. 2; *Bulwer's Case* (1); Co. Litt. 144b; *Ewer* v. *Jones* (2); Fitz. 47, 121; *Mostyn* v. *Fabrigas* (3); *Webb* v. *Jiggs* (4); *Thomas* v. *Sylvester* (5); *Thursby* v. *Plant*, 1 Wms. Saunders, Sir E. V. Williams' ed., pp. 306–308; *Daulson* v. *Matthews* (6); *Barker* v. *Damer* (7); *Wey* v. *Yally* (8); Story, Conflict of Laws, 534; *Burnett* v. *Lynch* (9); *Moule* v. *Garrett* (10); *Chatfield* v. *Berchtoldt.* (11)]

BRETT, J. The declaration in this case is framed in debt for the arrears of a rent-charge, and seeks to charge the defendant on the ground that he is tenant in possession of certain land under a devise by which the land is charged with a rent-charge in favour of the plaintiff's testator. The answer set up by the plea is, that the land in question is in Australia, and consequently that the action is not maintainable in this country. It seems to me that, apart from the question of venue, an action of debt would now be maintainable for the arrears of a rent-charge in such a case as the present. Before the Act which abolished real and mixed actions, I apprehend that debt would not have lain in such a case. The case of *Webb* v. *Jiggs* (4) shews that where a freehold rent-charge was created, as long as the estate continued, the only remedy, except distress, was by an action in the nature of a real or mixed action, and "debt" would not lie. If the rent was in arrear, and so continued when the estate came to an end, debt would lie, the Courts thinking them-

(1) 7 Co. Rep. 3 a.
(2) 2 Salk. 415.
(3) 1 Sm. L. C. 6th ed. 623.
(4) 4 M. & S. 113.
(5) Law Rep. 8 Q. B. 368.
(6) 4 T. R. 503.
(7) 3 Mod. 337.
(8) 6 Mod. 194.
(9) 5 B. & C. 589.
(10) Law Rep. 5 Ex. 132.
(11) Law Rep. 7 Ch. 192.

selves bound to give some remedy, and the real action no longer lying. The case of *Thomas* v. *Sylvester* (1), though not exactly in point, seems to me an authority for saying that when the statute got rid of real and mixed actions the same remedy would lie for arrears of the rent-charge during the continuance of the estate as after its determination. In an action of debt the venue is primâ facie transitory, but I think that though that is so we are bound by the authority of the decisions cited in the note to *Thursby* v. *Plant* in Wms. Saunders, Sir E. V. Williams' ed. p. 308, to hold that in some actions of debt the venue is not transitory, as for instance in actions for penalties. There the statute makes the venue local, but the note is also authority for saying that where there is no contract or covenant, but the debt only arises by reason of privity of estate, that is to say, when the liability depends on the defendant's being in possession of the estate charged and not on privity of contract, then the venue is local, and the action must be brought in the locality where the land is situated. Here the action does not arise out of privity of contract, but is founded on a breach of a duty to pay a certain sum arising out of privity of estate. Therefore, if the estate had been in England, the venue must have been laid in the county where the estate was. Here the will was an English will, and we must take it that it does in England create a rent-charge in respect of property in Australia, but the venue being local, and the land being in Australia, no action will lie in England, for plaintiff cannot bring an action in England that could only be tried in Australia. The plea is therefore an answer to the action, and our judgment must be for the defendant.

DENMAN, J. I am of the same opinion. I think that on both the points raised we are bound by authority. The case of *Thomas* v. *Sylvester* (1) is, I think, distinctly in point with regard to the first question raised before us. With regard to the second point, the plea states that the land on which the rent is charged is situated in Australia, and there is no doubt that the rule as to venue applies when the property in question is not situated in

(1) Law Rep. 8 Q. B. 368.

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England, but abroad, and that an action in which the venue would be local is not under those circumstances maintainable in England. In the present case there was no privity of contract, but the sole ground of the claim is the debt created by privity of estate, i.e., by possession of the estate in Australia on which the rent is charged. The cases cited from the note to *Thursby* v. *Plant*, Wms. Saunders, Sir E. V. Williams' ed. p. 308, are binding authorities to shew that in such a case the venue is local.

LINDLEY, J. I am of the same opinion. The obligation of the defendant to pay the arrears of the rent-charge does not arise from privity of contract but from privity of estate. It has been held in *Thomas* v. *Sylvester* (1), that an action of debt will now lie in such a case as this, but all actions of debt are not transitory actions, and it would appear from the authorities that such an action of debt as this, i.e. which arises not from privity of contract but from privity of estate only, is a local action. If this be so, it seems to follow inevitably on the authority of *Daulson* v. *Matthews* (2), that the action is not maintainable in England. I may refer in illustration of the law on this subject to the case of *Norris* v. *Chambers* (3), where the Master of the Rolls held that it was only under certain special circumstances that a Court of Equity would declare a lien on immoveable property situated out of the jurisdiction.

Judgment for the defendant.

Attorneys for plaintiff: *Whitakers & Woolbert.*
Attorney for defendant: *Donnithorne.*

(1) Law Rep. 8 Q. B. 368. (2) 4 T. R. 503.
(3) 29 Beav. 246; 30 L. J. (Ch.) 285.

TURNER, APPELLANT; MORGAN, RESPONDENT. 1875 *June* 4.

Game—Seizure on Highway—25 & 26 Vict c. 114, s. 2.

In order to give jurisdiction to magistrates to convict of an offence under 25 & 26 Vict. c. 114, s. 2, it is necessary that the game or instruments for killing or taking game should be seized and detained on the highway.

Clarke v. *Crowder* (Law Rep. 4 C. P. 638) followed.

CASE stated by justices, under 20 & 21 Vict. c. 43, of which the facts were in substance as follows:—

The appellant was charged, at a petty sessions for the division of Banbury and Bloxham, in the county of Oxfordshire, by an information laid by the respondent under the Poaching Prevention Act, 25 & 26 Vict. c. 114, s. 2, for that he was found in a certain highway, street, or public place, by the respondent, a constable or peace officer, who then had good cause to suspect him of coming from land where he had been unlawfully in search or pursuit of game, or aiding or abetting other persons who had been on land unlawfully in search or pursuit of game, and that he, the said appellant, then had in his possession certain game, to wit, twenty-four rabbits, which had been unlawfully obtained, contrary to the statute. About 10.45 a.m. on Saturday, the 31st of October, the appellant drove with a pony and cart out of the town of Banbury into the adjoining county of Northampton, and the respondent, who was a sergeant in the Oxfordshire constabulary, with another constable, went towards a bridge over the Cherwell, which river divides the counties of Oxford and Northampton, and waited for appellant's return, intending to search his cart before he re-entered Banbury. About 11.30 they saw him returning, and just as he approached the bridge the respondent called to him to stop; but he drove off at a furious rate up the town of Banbury, thereby preventing the officers from searching his cart; but as the cart passed the officers they both noticed a horse-rug lying at the bottom of the cart, with something, apparently bulky, underneath it. The officers could not overtake the cart, but it was proved that within a few minutes after the appellant had driven away he met a man

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named Greatrex, driving a cart in Banbury, and hurriedly gathered up a quantity of dead rabbits from his own cart, and tied them up in a bundle in a horse-rug, and dropped them into Greatrex's cart, and asked him to take them home.

The respondent came up in a few minutes afterwards, and took the rabbits out of Greatrex's cart, which was standing underneath a gateway immediately adjoining the public highway.

The appellant gave no account of his possession of the rabbits, but contended (inter alia) that there was no search of the appellant on the highway by a police constable, that there was no finding on the highway of any game upon the appellant by a police constable, and that there was no seizure or detention of any game upon the highway by a police constable on the appellant.

The justices found that the rabbits were in the cart when the constables saw the appellant, and that he was then either coming from land where he had been unlawfully in search or pursuit of game, or that he was aiding or abetting other persons who had been so unlawfully on land in search or pursuit of game, and was accessory thereto. They therefore convicted him.

The question for the Court was whether they were justified in so doing.

Graham, for the appellant. The appellant was convicted under 25 & 26 Vict. c. 114, s. 2. It is decided by *Clarke* v. *Crowder* (1) that to justify a conviction under that section, it is necessary that there should be a finding of game on the person accused on a highway. It is submitted that there was no finding of game in this case on the highway. It is not sufficient that the constable strongly suspected that there was game in the cart on the highway and afterwards found elsewhere that there was game. Even if there was a finding of game, it is submitted that there must be also a seizure of it on the highway. Here there was no such seizure. Secondly, there was no evidence that the appellant had been unlawfully on land in pursuit of game, or was accessory to any one else who had been so. This may be proved by circumstantial evidence, but there must be some evidence of it. It is consistent

(1) Law Rep. 4 C. P. 638.

with the facts proved here, that the appellant had become possessed of the game in any other way. It may have been stolen out of a poulterer's shop.

[BRETT, J. That does not seem a reasonable hypothesis under the circumstances. Was not the conclusion drawn by the justices the only reasonable inference from the facts?]

[He cited *Brown* v. *Turner* (1), *Hall* v. *Knox* (2), *Evans* v. *Botterill* (3), and *Jones* v. *Dicker*. (4)]

R. S. Wright, for the respondent. The case of *Clarke* v. *Crowder* (5) does not actually decide that seizure is necessary, but only a finding of the game on the highway. It is submitted that in this case the game was found on the highway. The constable may seize, but it is not a condition precedent to jurisdiction that he should do so. If it be, it would always be possible for the person found with game, by throwing it over the hedge before it could be seized, to prevent proceedings under the section, for the game could not then be seized on the highway.

BRETT, J. I am of opinion that our judgment in this case should be for the appellant, on the ground that one of the circumstances, which are essential as conditions precedent to the exercise of jurisdiction under 25 & 26 Vict. c. 114, s. 2, did not exist. I repeat what I said in *Clarke* v. *Crowder*. (5) The statute gives a new procedure and a new tribunal, which is to act on different evidence from that which would have been necessary before, and a new penalty is imposed. Being a penal statute, it is to be construed with reasonable strictness. It gives a constable, under certain circumstances, a power, without warrant, and on mere suspicion, to stop a person on a highway and search him, or any conveyance he may be in charge of. If such constable, on so stopping a person, finds any game, either on him or in his conveyance, he may seize and detain it. These are strong powers to give. Bovill, C.J., in *Clarke* v. *Crowder* (5), says, "If the Act had

(1) 13 C. B. (N.S.) 485; 32 L. J. (M.C.) 106.
(2) 4 B. & S. 515; 33 L. J. (M.C.) 1.
(3) 3 B. & S. 787; 33 L. J. (M.C.) 50.
(4) 22 L. T. (N.S.) 95.
(5) Law Rep. 4 C. P. 638.

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stopped there, there would have been no judicial tribunal to judge of the propriety of the exercise of these exceptional powers by the police; and the Act therefore proceeds to enact that the constable, when he has so done, shall take out a summons against the person." That being so, under what circumstances is the summons to be taken out? It is when the game is found upon the accused, or in his cart, on the highway, and has been there seized and detained. The only person who is to take out the summons is the constable who has so seized. I should say that there was evidence in this case from which the justices were justified in holding that the constable had reasonable grounds for being sure that game was in the cart, and therefore that game was found in the appellant's cart within the meaning of the section, but there was no seizure of such game. One of the conditions, therefore, of jurisdiction did not exist. It is unnecessary to decide any of the other points raised.

DENMAN, J. I am of the same opinion. I think this case is practically concluded by the decision in *Clarke* v. *Crowder*. (1) The only person entitled to take out the summons is "such" constable, i.e. the constable who has done the things previously mentioned in the section.

LINDLEY, J., concurred.

Judgment for the appellant.

Attorney for appellant: *T. W. Golding, for G. Crosbey.*
Attorneys for respondent: *King & McMillan.*

(1) Law Rep. 4 C. P. 638.

MILNES *v.* BALE.
MILNES *v.* LEA.

1875
June 8.

Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 *Vict. c.* 60), *s.* 3—17 & 18 *Vict. c.* 102, *s.* 2—*Bribery, Several Acts of—Several Penalties.*

Where a person has been guilty of several acts of bribery at a municipal election he is liable to a penalty in respect of each such act of bribery.

DECLARATION in the first of the above-mentioned actions. For that after the passing of the Corrupt Practices (Municipal Elections) Act, 1872, at an election of councillors holden in and for the borough of Kidderminster, to serve in the north ward of the said borough, and at which said election certain persons named in the declaration were severally candidates within the meaning of the said Acts and of other the statutes in force relating to municipal elections, the defendant (not one of the candidates), by himself, was guilty of bribery by giving money to five persons named in the declaration, being each of them a voter for the north ward at the said election, contrary to the said Corrupt Practices (Municipal Elections) Act, and other statutes in force concerning the same, whereby the defendant became liable to forfeit and forfeited the sum of 100*l.* for each and every of the said gifts or payments of money to each of the said voters, to the plaintiff, who sues the defendant for the same in this action under the said statutes.

Second count was similar, except that it alleged agreements to pay money to the same voters instead of actual payments.

Second plea, that the election in each of the said counts alleged to have been held was one and the same election, and that after the holding of the said election the defendant was sued by one Charles Hodges, in the Court of Common Pleas, for the recovery of the penalty by the statutes in that behalf provided and imposed in respect of bribery alleged to have been committed by the defendant, and of which he was guilty at the said election, which is the same bribery as in the said several counts of the declaration alleged, and that afterwards and before the commencement of this action, judgment was recovered by the said Charles Hodges, in

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the said action against the defendant for such penalty and costs of suit, which judgment remained unreversed.

Demurrer and joinder in demurrer.

The pleadings in the second action were substantially the same.

Giffard, Q.C. (with him, *Merewether*), for the plaintiff in both actions. The contention for the defendant is that any number of acts of bribery at the same election only constitute one offence. Each act of bribery is in its nature distinct, and each constitutes a distinct misdemeanor. There is nothing in the language of the Corrupt Practices (Municipal Elections) Act, to indicate that the legislature intended otherwise. The result of the defendant's contention is, that as soon as a man has bribed one voter he may as well bribe a thousand. *Cooper* v. *Slade* (1) is a strong negative authority in the plaintiff's favour, for two offences in the nature of bribery there being charged in one indictment, it was never suggested that there could be only one offence at the same election. So also the case of *Reg.* v. *Leatham* (2) is by implication a decision in favour of the plaintiff. For in that case it was held that the prosecution could be made to elect at the trial between different modes of establishing the charge of bribery. There could be no question of election if all the acts of bribery committed only constitute one offence. It was assumed that each act of bribery constitutes per se a complete separate offence.

[He also cited *Garrett* v. *Messenger* (3); *Reg.* v. *Scott.* (4)]

Powell, Q.C., for the defendant Bale. It is contended that the statute only imposes one penalty in respect of the offence of bribery at any election. All the individual acts of bribery committed at any election only go to constitute one offence, viz. bribery at that election. It never can have been intended that for each act of bribery the offender should be liable as for a separate offence to a distinct term of imprisonment, which would be the result if the plaintiff's contention is correct. It may be admitted that one act of bribery is a complete offence, but it does not

(1) 6 E. & B. 447; 25 L. J. (Q.B.) 324.

(2) 3 L. T. (N.S.) 504.

(3) Law Rep. 2 C. P. 583.

(4) 4 B. & S. 368; 33 L. J. (M. C.) 15.

follow that any other acts are distinct offences. The words "so offending," in 17 & 18 Vict. c. 102, s. 2, mean so offending by one or more acts. It is not necessary, however, in the present case, to go so far as to say that any number of acts of bribery are only one offence, for it is consistent with the allegations in the declaration, that all the persons bribed were bribed together upon one occasion, and that there was only one act of bribery.

[He cited *Crepps* v. *Durden* (1); *Rex* v. *Lovet* (2); *Pilcher* v. *Stafford*. (3)]

E. Clarke, for the defendant Lea.

[DENMAN, J. referred to the *Attorney General* v. *McLean* (4), where Pollock, C.B. asked, "Can any instance be cited of cumulative penalties when the legislature has not used language which in terms imposes a specific penalty for every such offence?"]

Here the legislature, if the intention had been as contended by the plaintiff, would have used some such words as "for each and every such offence." This is a penal statute and must be construed strictly.

Giffard, Q.C., in reply. In the case of *Crepps* v. *Durden* (1), the offence was not selling a loaf or loaves on a Sunday, but exercising a worldly calling on Sunday. All the different acts were only acts going to constitute one offence. So with regard to the case of keeping an unlicensed house of entertainment, *Marks* v. *Benjamin* (5) shews that the keeping must be in the nature of an habitual keeping. When the offence is such that several acts only go to make up one offence, there can be only one penalty. That principle is not applicable here.

BRETT, J. I am of opinion that the plaintiff is entitled to judgment. The action is brought for penalties under the 3rd section of the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60). By that section "the offences of bribery, treating, undue influence, and personation shall be deemed to be corrupt practices at an election for the purposes of this Act." And "the terms 'bribery, &c.,' shall respectively include anything committed

(1) 2 Cowp. 640.
(2) 7 T. R. 152.
(3) 4 B. & S. 775; 33 L. J. (M.C.) 113.
(4) 1 H. & C. 750; 32 L. J. (Ex.) 101.
(5) 5 M. & W. 565.

(3) 4 C 10 Jur N.S. 651.

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or done before, at, after, or with respect to an election," which in the case of a parliamentary election would render the person doing the same liable to any penalties for bribery, &c. Any person who is guilty of a corrupt practice at any of these times is rendered liable to the same penalties as if the corrupt practice had been committed at a parliamentary election. The 17 & 18 Vict. c. 102, s. 2, defines the offence of bribery at a parliamentary election, and the effect of it. The section enumerates various acts which shall amount to bribery. [His Lordship read the section.] Any person doing any one of these acts is guilty of the complete offence, and it appears to me that anyone who does two or more of such acts is guilty of two or more separate acts of bribery and offences against the statute. I think these different acts are so far distinct and separate offences in kind, that to prove a person guilty of any one of them evidence could not be given of the doing of any other of them. If a person were charged with any one such offence, I am of opinion that evidence of other such acts could not be admitted to shew that he was guilty. They are by nature distinct and separate offences. The moment that one of them is committed the offence is complete, and the committal of any other of them would be a complete separate offence. The statute then provides that any person "so offending shall be guilty of a misdemeanor, and shall also be liable to forfeit the sum of one hundred pounds to any person who shall sue for the same." The natural construction of the words "so offending," as it seems to me, would be that where several distinct offences are mentioned, they should apply to each of such offences; and that any person committing any such offences should be guilty of a misdemeanor in respect of each such offence. It seems to me that the argument for the defendant amounts to saying, that although a person is guilty of several offences, all those offences amount only to one misdemeanor. In other words, the effect of the contention is, in substance, that several misdemeanors constitute only one misdemeanor. The only sensible construction, in my opinion, is that a person guilty of one of such offences is guilty of one misdemeanor, and a person guilty of several of such offences is guilty of several misdemeanors. If this is so, the words as to the penalty must receive the same construction; and if there be several misdemeanors, there must be

several penalties. It has been argued that because there are no such words as these, "and any person so offending shall be liable for each and every of such offences to forfeit, &c.," only one penalty can be inflicted in respect of one election. Various decisions were cited as authorities in favour of the contention that there can be only one penalty. If I understand the effect of these cases rightly, in every case where it was held that there could only be one penalty in respect of several acts, it was because all the acts only constituted one offence against which the penalty was enacted. The test, as it appears to me, is whether, having charged the offence against which the penalty is enacted, you can prove it by giving in evidence several distinct acts committed by the person charged. It is not strictly accurate to speak of the penalties as cumulative in such a case as the present. The question is, whether there is one or more offences, and if the offences are distinct, there is only one penalty for each offence. I cannot find that in any case in which each act done was a complete offence in itself, and in which it would have been inadmissible to give other acts in proof of the committal of the same offence, it was held that several penalties could not be inflicted. In the case of *Reg.* v. *Scott* (1) the effect of the decision seems to me to be this: where several oaths are made use of on one occasion it is but one swearing, and consequently there is only one offence and only one penalty is incurred, though such penalty is cumulative, being at the rate of two shillings for each oath; but if the same set of oaths were used on distinct occasions, though they all occurred on the same day, there would be several offences, and a penalty would be incurred for each distinct swearing. There is no decision that if a man swore at one person at one time of the day, and at another person at another time, he would not be liable to two penalties. It seems to me that in such a case he would be liable to two penalties, because there would be two offences. In *Garret* v. *Messenger* (2) the offence charged was keeping open an unlicensed house. It is not keeping it open for an hour that is the offence; the offence is the keeping a house to be used as a house of entertainment without a licence, which is a comprehensive offence to be proved by many acts. According to

(1) 4 B. & S. 368; 32 L. J. (M.C.) 15. (2) Law Rep. 2 C. P. 583.

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the case of *Marks* v. *Benjamin* (1), it is necessary, in the case of a charge of this sort, to give evidence of more than having the house open for a short period or in a particular instance. In such a case a penalty cannot be imposed for each act, because each act is not a separate offence. So in *Pilcher* v. *Stafford* (2) the ground of the decision was that there was only one offence, viz. leaving a child unvaccinated for a certain period, and consequently there could only be one penalty. Again, in *Crepps* v. *Durden* (3), the offence contemplated was exercising the party's ordinary calling on Sunday. It was not the doing of one isolated act that would be evidence of the committal of the offence, but several acts might be given in evidence to prove one offence. All these decisions are inapplicable to the present case, because each act of bribery is a complete offence in itself. The case of *Cooper* v. *Slade* (4), though not a decision directly in point, seems to me a strong authority in favour of our view, because in that case there were two acts of bribery charged in different counts, and though the case went through all the courts up to the House of Lords on the question whether there should be a venire de novo, it was never suggested that there might not be a verdict on each count for a separate penalty. It is strong negative evidence in favour of the conclusion at which we have arrived, that to none of the counsel and judges engaged in that case the point now taken by the defendant's counsel ever occurred. *Reg.* v. *Leatham* (5) is also a strong authority pointing in the same direction, for the power of putting the prosecution to election only arises when two offences are charged in the same indictment, and it must therefore have been assumed in that case that there were two distinct offences charged. It is urged that the consequence of holding a person liable to a separate penalty in respect of each act of bribery at an election will be most serious, but it seems to me that if persons will commit distinct acts of bribery at an election, there is nothing harsh in subjecting them to a penalty for each act. It would be strange where there were several candidates that a person should be able

(1) 5 M. & W. 565.
(2) 4 B. & S. 775; 33 L. J. (M.C.) 113.
(3) 2 Cowp. 640.
(4) 6 E. & B. 447; 25 L. J. (Q.B.) 324.
(5) 3 L. T. (N.S.) 505.

to bribe one set of voters to vote for one candidate and another for another, and yet should be only liable to be charged with one misdemeanor. So also if a voter took first one bribe to vote for a candidate and then another to vote against him, it would be very strong to say that he should be only subject to one penalty. It is however upon the words of the statute, and the authorities interpreted as I have suggested, that I come to the conclusion that, there being several distinct offences, the defendant is subject to, I will not say cumulative penalties, for the expression, as I have before said, does not seem to me accurate, but to a distinct penalty for each separate offence.

DENMAN, J. But for the strongly restrictive mode of construction which the courts have always been in the habit of using with respect to penal statutes, I should have had no doubt in this case from the outset; but this is one of those cases in which the courts have always held themselves bound to construe the statute strictly, and not to hold that a forfeiture has arisen unless the words of the statute so construed clearly shew that the legislature intended it. After a full consideration of the words of the Act, I come to the conclusion that the defendant is plainly liable to all the penalties claimed. The only way in which the defendant's case could be put, as it seems to me, is that the statute only gives the right of recovering one penalty of 100*l.* to one person in respect of the same election, and that no person having once recovered one penalty could recover another in respect of bribery at the same election. Now it seems to me that, as was pointed out by my brother Brett, we could only hold this to be so by holding that the meaning of the statute is, that where a man is guilty of twenty acts of bribery, he is only guilty of one offence. I think that such an interpretation would be unreasonable, and moreover could only be given by doing violence to the natural meaning of the words of the Act. With respect to the authorities, I will only add a few words by way of expressing my concurrence in the view taken of them by my brother Brett. In all the decisions it seems to me that the distinction is between cases where the penalty is imposed in respect of a complex and continuous act, and those where it is imposed in respect of a simple uncomplicated offence

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which is complete, and may be proved by evidence of one isolated act. That distinction runs through all the cases in my opinion. I will not go through them in detail, but I will just refer to one decision which seems a good illustration of the principle, viz. the case of *In re Hartly*. (1) The proceeding there was for penalties for exposing bad meat for sale, and it was then argued that only one penalty could be inflicted in respect of several pieces of bad meat, on the ground that the offence was an entire offence. The Court declined to give effect to the argument on the ground, I apprehend, that the offence was not one involving a continuous act, such as exercising a calling on Sunday, as in *Crepps* v. *Durden* (2), but each single act of exposing bad meat was in itself a complete offence, and therefore if the act was done several times several penalties were incurred.

Judgment for the plaintiff.

Attorney for plaintiff: *Girdwood.*
Attorney for defendant Bale: *Hunt.*
Attorney for defendant Lea: *Cooke.*

July 9.

HICKMAN *v.* HAYNES AND ANOTHER.

Sale of Goods—Statute of Frauds—Postponement of Period for Performance—Parol Variation—Condition Precedent—Readiness and Willingness to deliver—Waiver—Estoppel—Measure of Damages.

/CPD222 By a written contract the plaintiff agreed to deliver, and the defendants to accept, a certain quantity of iron, of greater value than 10*l.*, in the month of June. On the 2nd of June, and again in the middle of June, one of the defendants saw the plaintiff, and verbally requested him to allow the delivery of the iron to stand over, and the plaintiff verbally consented to his request. On the 1st of August the plaintiff pressed the defendants to take delivery, and the defendants, after some correspondence, wrote on the 9th of August asking for further time. The plaintiff again waited, but without result. On the 20th of October the plaintiff brought his action for non-acceptance of the goods in accordance with the terms of the written contract.

It was contended by the defendants that by reason of the arrangement to postpone delivery and acceptance made before any breach of the contract, the

(1) 31 L. J. (M.C.) 232. (2) 2 Cowp. 640.

plaintiff could not recover upon the original contract, there never having been readiness and willingness to deliver or any tender of delivery on the plaintiff's part under such contract; and that the plaintiff could not rely on any new or substituted contract to accept at a later date, such contract being verbal only :—

Held, that, the true effect of what took place between the parties being that the plaintiff voluntarily withheld delivery at the request of the defendants, no new contract being substituted for the original written contract, the plaintiff was entitled to maintain his action; and that the damages must be estimated according to the market-price of iron at a reasonable time after the last request of the defendants to withhold delivery.

THIS was an action for breach of a contract to accept 100 tons of iron by monthly deliveries of 25 tons in March, April, May, and June, the breach alleged being the refusal to accept the last quantity of 25 tons in June.

The pleadings and facts sufficiently appear from the headnote and judgment.

A rule nisi having been obtained to enter a nonsuit or to reduce the damages as appears below,

Jelf shewed cause. It will be contended for the defendants that there was no evidence of a breach of the contract declared upon. But the fact that the defendants, before the time for delivery had expired, informed the plaintiff that they did not wish to take delivery, and asked for time, is evidence of a complete breach before the expiration of the time for delivery, on the principle of *Hochster* v. *De la Tour*. (1) If this be so, no question can arise as to the effect of any parol variation of the time for delivery, for the arrangement as to postponement would be after breach. But, if this be not so, it is contended that the parol arrangement for postponement did not affect the original contract, and that that contract subsisted and was broken by the non-delivery of the iron in June: see *Ogle* v. *Lord Vane*. (2) The county court judge expressly finds that there was no binding agreement by the plaintiff to postpone the time. There was, therefore, no substituted parol contract at all. *Stead* v. *Dawber* (3) is distinguishable on that ground. It was a purely voluntary withholding of delivery on the plaintiff's part at the defendants' request. He could at any moment

(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

(2) Law Rep. 2 Q. B. 275; Law Rep. 3 Q. B. 272.

(3) 10 A. & E. 57.

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have withdrawn the indulgence and demanded acceptance of the goods.

It has never been decided that the party for whose benefit a condition precedent is to be performed may not waive it by parol though the contract is within the Statute of Frauds. The defendants are estopped from saying that the plaintiff was not ready to deliver in June, inasmuch as but for their own request the plaintiff was ready and willing to deliver.

[He cited *Tyers* v. *Rosedale Iron Co.* (1); *Leather Cloth Co.* v. *Hieronimus.* (2)]

Benjamin, Q.C., and *Bosanquet*, supported the rule. There never was any breach of the original contract, and the new agreement for delivery at a later period, being by parol only, cannot be valid. The contention of the plaintiff that there was a prospective breach before the expiration of the time for delivery, according to the principle laid down in *Hochster* v. *De la Tour* (3) and that class of cases, cannot be sustained; for, in order to make the prospective refusal of the defendants to perform a breach, it must be accepted as such. If the plaintiff does not accept it as such, but goes on with the contract, he cannot afterwards say it was broken before the time for performance: *Frost* v. *Knight.* (4) Here, the defendants' statement that they would not take delivery is not treated as a breach by the plaintiff. Then, if this be so, there is no evidence of a breach in June, because before the time for delivery, and before breach, the parties mutually arranged that the one should not make or the other accept delivery in June. There can be no refusal to accept in June, because there was no tender of delivery. *Ogle* v. *Lord Vane* (5) is not the present case; there, a breach having been committed, the plaintiff voluntarily forbore to insist on performance, and it was held that this might postpone the period of calculating the damages. Here, the agreement to postpone was before breach. It is clear that the parties did not contemplate that after that arrangement non-acceptance in June should constitute a breach of contract.

(1) Law Rep. 8 Ex. 305; Law Rep. 10 Ex. 195.
(2) Law Rep. 10 Q. B. 140.
(3) 2 E. & B. 678; 22 L. J. (Q.B.) 455.
(4) Law Rep. 5 Ex. 322; Law Rep. 7 Ex. 111.
(5) Law Rep. 2 Q. B. 275; Law Rep. 3 Q. B. 272.

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[They cited *Noble* v. *Ward* (1); *Marshall* v. *Lynn* (2); *Stead* v. *Dawber* (3); *Goss* v. *Lord Nugent.* (4)] 1875

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Cur. adv. vult.

July 9. The judgment of the Court (Lord Coleridge, C.J., Grove, Archibald, and Lindley, JJ.,) was delivered by

LINDLEY, J. This was an action for not accepting certain iron agreed to be sold by the plaintiff to the defendants. The contract for sale of the iron was in writing, and was required so to be by the 17th section of the Statute of Frauds. The bought-note was as follows:—

"Tipton, 6th March, 1873. Bought of Alfred Hickman, Esq., one hundred tons of Grey Forge Mine pig iron, at 7*l.* 10*s.* per ton. Delivered at Tividale Street Mills, Tipton. Payment in cash, less 2½ discount, monthly. Delivery twenty-five tons this month, and twenty-five tons per month during April, May, and June next.

"The Tividale Iron Company. J. P. Haynes."

Pursuant to this contract the plaintiff delivered and the defendants accepted and paid for seventy-five tons of the iron; but, owing to the circumstances stated below, the plaintiff did not deliver the last twenty-five tons, for the price of which the action is brought.

It appears from the evidence taken at the trial, that, on the 2nd of June, and again in the middle of June, the defendant Haynes saw the plaintiff, and verbally requested him to allow the delivery of the last twenty-five tons to stand over, and that the plaintiff verbally assented to this request; and accordingly nothing further was done by either side until the 1st of August, 1873, when plaintiff wrote to defendants as follows:—"Permit me to call your attention to your contract with me for pig iron, of which twenty-five tons remain to be delivered. I have held them until now, as you requested, and shall be glad to know when you propose to take delivery. If it is not convenient for you to take the

(1) Law Rep. 1 Ex. 117; Law Rep. 2 Ex. 135. 12 Jur N.S. 167.
(2) 6 M. & W. 109.
(3) 10 A. & E. 57.
(4) 5 B. & Ad. 58.

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iron, I shall be glad to know if you will be willing to pay the difference in price, if I instruct Mr. Lewis to sell them."

This led to some correspondence, which was terminated by a letter written by the defendants on the 9th of August, asking for more time. The plaintiff again waited for a reasonable time, but without result. On the 20th of October, 1874, the writ was issued.

The case was sent for trial in the Dudley county court, and was tried there on the 28th of May, 1875, when a verdict was found for the plaintiff, damages 25*l.*, with leave for the defendants to move for a nonsuit, or for a reduction of the damages. Pursuant to the leave thus reserved, a rule was obtained to shew cause why a nonsuit should not be entered, on the ground that the parol agreement to postpone delivery of the iron was invalid under the Statute of Frauds, or why the damages should not be reduced to 21*l.* 17*s.* 6*d.*, or to 7*l.* 5*s.*, if the Court should be of opinion that they ought to be assessed on the 30th of June, 1873, or on the 2nd of June, 1873.

The declaration was framed upon the contract above set forth, and averred as a breach, that, although the defendants had accepted and paid for seventy-five tons, they would neither accept nor pay for the last twenty-five tons; alleging also that the defendants had exonerated the plaintiff from delivering the twenty-five tons at the Tividale Street Mills, as agreed.

Amongst other pleas, the defendants traversed the alleged exoneration, and also pleaded, thirdly, that the plaintiff was not ready and willing to deliver the said twenty-five tons according to the terms of the agreement; and, fifthly, that before breach the plaintiff discharged the defendants from further performance of the agreement.

In this state of the record, and upon the evidence above set forth, it was contended before us that there was in fact a new and substituted agreement for delivery and acceptance of the last twenty-five tons of iron at a time subsequent to that originally agreed upon, which was sufficient to exonerate the defendants from the further performance of the original agreement, but which, not being in writing, could not be enforced, by reason of the Statute of

Frauds, and that no amendment of the declaration, therefore, would enable the plaintiff to maintain his action; and also that the plaintiff's verbal assent to postpone the delivery of the twenty-five tons until the 1st of August established conclusively that he was not ready and willing to deliver in June, according to the terms of the written contract, and therefore he was not in a condition to recover upon the original contract as set out in the declaration.

It is to be observed that there was no plea, in terms, of a new and substituted contract. The defendants' contention was based upon the fifth plea, i.e. of a discharge before breach, relying upon the evidence also in support of the plea alleging absence of readiness and willingness to deliver pursuant to the written agreement. The argument, in substance, was, that the plaintiff was not in fact ready and willing to deliver the iron according to the written contract, and that in point of law it was immaterial that he would have delivered or been ready and willing to deliver the iron according to the written contract, had it not been for the previous verbal request of the defendants not to deliver it. It was frankly admitted by the defendants' counsel that this defence was quite beside the real merits of the case; but it was strenuously contended that, having regard to the Statute of Frauds, and to the decisions of *Noble* v. *Ward* (1), *Stead* v. *Dawber* (2), and *Goss* v. *Lord Nugent* (3), the plaintiff could not maintain his action, and ought to be nonsuited.

The proposition that one party to a contract should thus discharge himself from his own obligations by inducing the other party to give him time for their performance, is, to say the least, very startling, and if well founded will enable the defendants in this case to make use of the Statute of Frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff. It need hardly be said that there must be some very plain enactment or strong authority to force the Court to countenance such a doctrine.

The Statute of Frauds contains no enactment to the effect con-

(1) Law Rep. 1 Ex. 117; in error, Law Rep. 2 Ex. 135.

(2) 10 A. & E. 57.

(3) 5 B. & Ad. 58.

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tended for. The utmost effect of the 17th section is to invalidate any verbal agreement for the sale of goods in certain cases; and, even if a verbal agreement for extending the time for the delivery of goods already agreed to be sold is within the statute,—as to which see per Martin, B., in *Tyers* v. *Rosedale and Ferryhill Iron Co.* (1) and *Leather Cloth Co.* v. *Hieronimus* (2),—the plaintiff in this case is not attempting to enforce any such verbal agreement, but is suing on the original agreement, which was in writing.

ICPD. 223.

The case of *Noble* v. *Ward* (3) merely shews that a parol agreement to extend the time for performing a contract in writing, and required so to be by the Statute of Frauds, does not rescind, vary, or in any way affect such written contract, and cannot in point of law be substituted for it. In *Stead* v. *Dawber* (4) there was a written agreement for the delivery of goods on a particular day, and a subsequent verbal agreement for their delivery on a later specified day; and the Court came to the conclusion that the parties intended to substitute the later verbal agreement for the previous written agreement. But, in the case now before the Court, there was no fresh agreement at all for the delivery of the twenty-five tons which can be regarded as having been substituted for the original written contract. There was nothing more than a waiver by the defendants of a delivery by the plaintiff in June of the last twenty-five tons of iron; and it should seem that in *Stead* v. *Dawber* (4) the Court would have been in favour of the plaintiff if they had come to the conclusion that there had been no substitution of one agreement for another. *Marshall* v. *Lynn* (5) was a somewhat similar case decided on similar grounds.

Goss v. *Lord Nugent* (6) turned on the 4th and not on the 17th section of the statute; but we do not think this important. The plaintiff had agreed in writing to sell certain property to the defendant, and to make a good title to the whole; but this the plaintiff was unable to do. He never could, therefore, have maintained

(1) Law Rep. 8 Ex. 305; in error, Law Rep. 10 Ex. 195.
(2) Law Rep. 10 Q. B. 140.
(3) Law Rep. 1 Ex. 117; in error, Law Rep. 2 Ex. 135. 12 Jur. N.S. 167
(4) 10 A. & E. 57.
(5) 6 M. & W. 109.
(6) 5 B. & Ad. 58.

an action on the original written contract, if nothing further had been done. But the defendant verbally agreed to waive his right to call for a good title to part of the land; and, having afterwards declined to complete the purchase, he was sued by the plaintiff, and it was held that the action did not lie. The ground of this decision was, that the plaintiff was in truth seeking to enforce an agreement relating to land, and which agreement was partly in writing and partly verbal, which by the statute he could not do. The Court in this case also regarded the parties as having entered into a new verbal contract as to part of the property, and as having substituted this contract for the original written contract; and in this view of the case the plaintiff could not recover.

In *Stowell* v. *Robinson* (1) it was held that the time for performing a contract in writing for the sale of land could not be enlarged by parol. In that case the defendant set up the parol agreement in answer to the plaintiff's action for the recovery of his deposit, and, the Court holding the parol agreement to be invalid, the plaintiff recovered.

The result of these cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds. But, so far as this principle has any application to the present case, it appears to us rather to preclude the defendants from setting up an agreement to enlarge the time for delivery in answer to the plaintiff's demand, than to prevent the plaintiff from suing on the original contract for a breach of it. There was, in truth, in this case no binding agreement to enlarge the time for delivery. The county court judge finds that the plaintiff permitted the defendants to postpone, for their own convenience, the acceptance of the iron in dispute, and that the voluntary withholding delivery at the request of the defendants was usual in the ordinary course of dealings of a similar kind in the iron trade. This finding, in fact, shews that at any time in June either party could have changed his mind, and required the other to perform the contract according to its original terms: see *Tyers* v. *Rosedale*

(1) 3 Bing. (N.C.) 928.

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and Ferryhill Iron Co. (1) as decided in error, reversing the decision below. (2)

The distinction between a substitution of one agreement for another and a voluntary forbearance to deliver at the request of another, was pointed out and recognized in *Ogle* v. *Lord Vane.* (3) In that case the plaintiff sued the defendant for not delivering iron pursuant to a written contract, and the plaintiff sought to recover as damages the difference between the contract price of the iron and the market price, not at the time of the defendants' breach, but at a later time, the plaintiff having been induced to wait by the defendant, and having waited for his convenience. It was contended that the plaintiff was in fact suing for the breach of a new verbal agreement for delivery at a later date than that fixed by the original agreement; but the Court held otherwise, and that, as the plaintiff had merely forborne to press the defendant, and had not bound himself by any fresh agreement, the plaintiff could sue on the original agreement, and obtain larger damages than he could have obtained if he had not waited to suit the defendant's convenience. Mr. Justice Blackburn (4) pointed out very clearly the distinction to which we are now adverting, and came to the conclusion that in *Ogle* v. *Lord Vane* there was no substitution of one contract for another, and that all that the parties did was this: "The plaintiff was willing to wait at the request of the defendant for the defendant's convenience, and he did wait for a long time, till February; but, if he had lost patience sooner, and refused to wait longer, he would have had a right to bring his action at once for the breach in July. It is clearly a case of voluntary waiting, and not of alteration in the contract; and the length of time can make no difference." In that case, the request for forbearance was made by the vendor after the contract had been broken: in this case the request for time was made by the purchasers both before and after the time for completing the contract had expired: but this distinction does not appear to us to be material: see *Tyers* v. *Rosedale and Ferryhill Iron Co.* (5)

(1) Law Rep. 10 Ex. 195.
(2) Law Rep. 8 Ex. 305.
(3) Law Rep. 2 Q. B. 275; in error, Law Rep. 3 Q. B. 272.
(4) Law Rep. 2 Q. B. at p. 282.
(5) Law Rep. 8 Ex. 305; in error Law Rep. 10 Ex. 195.

In conclusion, we think that, although the plaintiff assented to the defendants' request not to deliver the twenty-five tons of iron in question in June, he was in truth ready and willing then to deliver them, and that the defendants are at all events estopped from averring the contrary. The plaintiff not having bound himself by any valid agreement to give further time, but having for the convenience of the defendants waited for a reasonable time after the letter of the 9th of August, to enable the defendants to perform the contract on their part, is entitled on the expiration of that time to treat the contract as broken by the defendants at the end of June, when in truth it was broken.

The question whether the damages ought to be estimated at 21*l.* 17*s.* 6*d.*, i.e. according to the price of iron at that time, or at 25*l.*, i.e. according to the price at the end of a reasonable time after the letter of the 9th of August, was admitted to be immaterial; but, on the principle of *Ogle* v. *Lord Vane* (1), we think the plaintiff was entitled to have the damages assessed according to the price at the later date. For these reasons, therefore, we are of opinion that this rule to set aside the verdict, and to enter a nonsuit, or to reduce the damages, ought to be discharged.

Rule discharged.

Attorney for plaintiff: *T. J. Needham, for Bourne & Owen, Dudley.*

Attorneys for defendants: *Emmet & Son, for Sanders, Smith, & J. Heath Stubbs, Birmingham.*

WALLACE *v.* ALLEN.

June 11.

Practice—Prohibition, Rule for—Mayor's Court—Costs.

The Court, in making a rule absolute for a prohibition without pleadings, may grant the costs.

IN this case a rule nisi for a prohibition to the Mayor's Court had been obtained by a stranger to the suit, on the ground that the

(1) Law Rep. 2 Q. B. 275; in error, Law Rep. 3 Q. B. 272.

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cause of action had arisen beyond the jurisdiction of the Mayor's Court. The rule was moved with costs against the plaintiff.

The Court being of opinion that the rule must be made absolute for the prohibition,

Bovell, who shewed cause, contended, on the authority of *Ex parte Overseers of Everton* (1), that the Court could not give costs.

Foard supported the rule. The case of *Ex parte Overseers of Everton* (1) only shews that the statute 1 Wm. 4, c. 21, s. 1, does not give the costs of the rule where there have been no pleadings in prohibition. The rule in that case was not moved with costs. But where, as here, the rule was moved with costs, the Court has a common-law jurisdiction to make it absolute with costs.

LORD COLERIDGE, C.J. I think this rule should be made absolute with costs. The case cited is distinguishable. There the application was for costs under the statute, and it was held that the provisions of the statute as to costs did not apply. It is laid down in Tidd's Practice, 8th ed. p. 508, generally, that where cause is shewn against a rule, the Court may make the rule absolute or discharge it with or without costs.

GROVE, ARCHIBALD, and LINDLEY, JJ., concurred.

Rule absolute accordingly.

Attorney for applicant: *T. Buckland.*
Attorney for plaintiff: *Tripp.*

(1) Law Rep. 6 C. P. 245.

[IN THE EXCHEQUER CHAMBER.]

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June 26.

ANDERSON *v.* MORICE.

Marine Insurance—Insurable Interest—Commencement of Risk—Incomplete Cargo—Seaworthiness—Peril of the Sea—Evidence—Burthen of Proof.

A ship, whose cargo was insured by a marine policy, began suddenly to leak, and sank at her anchors in port during fine weather. In an action on the policy evidence was given on the part of the assured tending to shew that the ship was seaworthy, viz., that she had not long before been put in good repair, that surveys had been made of her just previously, and that she had behaved well on previous voyages and on her voyage to the port where she was lost. No evidence was given of any actual facts shewing the cause of her loss, although possible explanations of it, by way of conjecture, were suggested by the witnesses:—

Held (affirming the decision of the Court below), that there was evidence of a loss by the perils insured against.

The plaintiff, a merchant in London, contracted with B. S. & Co., of Calcutta, for the purchase of rice as follows:—"Bought for account of A. of B. S. & Co., the cargo of new crop Rangoon rice, per *Sunbeam*, 707 tons register, at 9s. 1½*d.* per cwt. cost and freight. Payment by sellers' draft on purchasers, at six months' sight, with documents attached."

The *Sunbeam* was chartered by the sellers' agent to proceed to Rangoon to ship the cargo of rice. The plaintiff effected an insurance with the defendant as follows:—"At and from Rangoon, to any port in the United Kingdom or Continent, by the *Sunbeam*, on rice, as interest may appear," &c. While loading at Rangoon, and the greater part of the cargo having been shipped, but a substantial part still remaining to be shipped, the *Sunbeam* sank, and the rice already shipped was wholly lost. The captain afterwards signed bills of lading for the cargo shipped, which were indorsed to the plaintiff, and the sellers drew bills of exchange for the price of such cargo, which were accepted and met by the plaintiff:—

Held (by Bramwell, B., Blackburn and Lush, JJ., and Pollock and Amphlett, BB., Quain, J., dissenting, reversing the decision of the Court below), that the plaintiff had no insurable interest in the rice, inasmuch as it was not at his risk under the contract of sale until the loading was complete.

Affirmed by H. of L. 1 App. Cas. 713

APPEAL from the decision of the Court of Common Pleas, in favour of the plaintiff.

The facts of the case sufficiently appear from the report in the Court below. (1)

Butt, Q.C. (with him *Cohen, Q.C.*, and *Hollams*), for the defendant. There was no evidence of a loss by perils insured against to

(1) Ante, p. 58.

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go to the jury. It may be that conclusive evidence of seaworthiness would have been a proof of loss by a peril insured against, but it is does not follow that, because there was some evidence of seaworthiness, there was therefore evidence of a loss by perils of the sea. There must be reasonable evidence to go to the jury; a mere scintilla is not sufficient. Seaworthiness consists of many things, and though a ship may be a good ship enough in many respects, one small matter may make her unseaworthy. It cannot, then, be reasonably said that some general evidence of seaworthiness, such as was given in this case, amounts to evidence to go to the jury of a loss by perils insured against. In the absence of any positive evidence of such a loss exhaustive evidence negativing unseaworthiness in all particulars is necessary to raise a presumption of the alternative cause of loss, viz. a peril insured against: *Giblin* v. *McMullen* (1), *Prescott* v. *Union Marine Insurance Co.* (2) Secondly, there was no evidence of an insurable interest. The contract of marine insurance is a contract of indemnity, and the rice never was at the plaintiff's risk. The purchaser was under no liability to accept the seller's drafts until the bills of lading could be tendered. The intention clearly was that the property should not pass until the drafts were accepted.

[BLACKBURN, J. Apart from any question as to the property passing, may not the goods be at the purchaser's risk, and so he be entitled to insure?]

It is not necessary to contend that the property need have passed to give an insurable interest, but that there cannot be an insurable interest, because the cargo never having been completed the rice never was at the purchaser's risk. The rice was not to be at the purchaser's risk until the cargo was completed and bills of lading signed. [He cited on the second point *Kreuger* v. *Blanck* (3), *Appleby* v. *Myers* (4), *Sparkes* v. *Marshall* (5), and *Vernede* v. *Weber*. (6)]

Watkin Williams, *Q.C.* (with him *J. C. Mathew*), for the plaintiff.

[BRAMWELL, B. The Court is of opinion that there was evi-

(1) Law Rep. 2 P. C. 317, 335.
(2) 1 Whart. Penn. 399.
(3) Law Rep. 5 Ex. 179.
(4) Law Rep. 2 C. P. 651.
(5) 2 Bing. N. C. 761.
(6) 1 H. & N. 311; 25 L. J. (Ex.) 326.

dence for the jury of a loss by a peril insured against. The argument for the plaintiff may therefore be confined to the question of insurable interest.]

The rice that was shipped was irrevocably appropriated to the contract; if the purchaser elected to take it, although the cargo never was complete, he was entitled to do so. It is like the case of a deviation which, though it would excuse the charterer, would not entitle the shipowner to withdraw the ship. The seller could not withdraw the rice once shipped. Consequently when the rice is shipped an insurable interest arises in the plaintiff. The question whether he was liable to pay for the rice has nothing to do with the question of insurable interest. There might have been a large margin of interest beyond the price.

[BLACKBURN, J. This is a policy on goods, not profits; the goods are valued at the shipping prices.]

The contract clearly indicates that the risk was intended to be on the purchasers so soon as the goods were waterborne. It would be very inconvenient that there should be two insurances; one by the vendor during the lading, the other by the purchaser when the lading was complete. [He cited *Castle* v. *Playford* (1); *Tamvaco* v. *Lucas* (2); *Lucena* v. *Craufurd* (3); 2 Duer. 168; *Joyce* v. *Swann* (4); *McKenzie* v. *Whitworth* (5); *Ebsworth* v. *Alliance Marine Insurance Co.* (6); *McSwinny* v. *Royal Exchange Insurance Co.* (7); *Watson* v. *Shankland.* (8)]

Butt, Q.C., in reply. There is no inconvenience or injustice as suggested. The vendor must insure the rice on its way down the river to Rangoon. The shipper's great risk commences when the voyage commences, and accordingly he insures against sea perils. If the vendor goes uninsured on the river perils, he may as well go uninsured on them till the voyage begins; on the other hand, if he insures, he may as well insure up to the same point. [He cited *Stockdale* v. *Dunlop* (9); Phillips, vol. 1, s. 174.]

Cur. adv. vult.

(1) Law Rep. 7 Ex. 98.
(2) 1 E. & E. 581; 28 L. J. (Q.B.) 301.
(3) 2 B. & P. (N.R.) 269.
(4) 17 C. B. (N.S.) 84.
(5) Law Rep. 10 Ex. 142.
(6) Law Rep. 8 C. P. 596.
(7) 14 Q. B. 634.
(8) Law Rep. 2 H. L., Sc. 304.
(9) 6 M. & W. 224.

(2) SC 5 Jur NS. 1258.

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June 26. The following judgments were delivered:—

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QUAIN, J. As to the first point argued before us, namely, whether there was any evidence of a loss by perils of the seas, I agree with the other members of the Court, that there was evidence from which the jury were fairly at liberty to infer a loss by sea perils. But I am unable to concur with the other members of the Court in holding that the plaintiff had no insurable interest in the rice at the time of the loss, and that on that ground the judgment of the Court below should be ~~affirmed.~~ reversed.

It seems to me to have been the manifest intention of the parties to the contract of the 2nd of February, 1871, that the rice should be at the risk of the plaintiff from the time it was loaded on board the ship, and that therefore he had an insurable interest in it from that time.

By the contract the plaintiff bought the cargo of rice per *Sunbeam*, at 9*s.* 1½*d.* per cwt. cost and freight. Payment by sellers' draft on purchasers, with documents attached. As the price included cost and freight only, and not insurance, it seems plain that the insurance, if any, was to be effected by the purchaser; and in a letter dated the 7th of March, 1871, from the sellers' agents to the plaintiff, which was put in evidence, a telegram from the sellers at Calcutta, dated the 6th of March, is set out in these words: "*Sunbeam*, Rangoon.—Advise Anderson. Insurance." Before the receipt of this telegram, namely, on the 3rd of February, 1871, the day after the making of the contract, the plaintiff effected the present policy "on rice by the *Sunbeam*, as interest may appear."

The policy is in the usual form, "beginning the adventure on the said goods from the loading thereof aboard the said ship"; but it is said that though the language of the policy is sufficient to cover a loss during the loading, the interest of the plaintiff in the goods did not attach till the loading was complete and the shippers in a position to obtain bills of lading, and this, on the ground that the plaintiff was only bound to pay by acceptance of a draft with documents attached.

But I think it is fairly to be inferred from the fact that the plaintiff was to insure the goods, and had notice from the sellers to insure on the 6th of March, which was before the loading

began, that the plaintiff was to insure the goods in the ordinary way by an ordinary policy from the loading, and therefore that it was intended that the goods should be at his risk from that time. It could scarcely have been within the contemplation of the parties —especially in a case like the present, where the ship was being loaded, not in dock, but from lighters at the mouth of a river—that the cargo should remain uncovered by insurance during the loading, or that it would require two policies, one effected by the vendor to cover the goods during the loading, and another by the vendee to attach from the time that the loading was complete.

The fact that the goods were to be paid for by an acceptance with documents attached, is not inconsistent with the goods being at the risk of the vendee before the time arrived for obtaining the necessary documents or for presenting the draft for acceptance, if it can be inferred from the facts of the case that such was the intention of the parties. In *Fragano* v. *Long* (1), the goods were to be paid for three months after their arrival at Naples. By the terms of the order the goods were to be despatched on insurance being effected. Insurance on behalf of the vendee was effected accordingly, and the Court held that it was to be inferred from the order to insure that the goods were to be at the risk of the vendee, and that he was bound to pay for them, though they were lost and never arrived at Naples. "I was next contended," says Holroyd, J., in that case, "that Fragano was not liable to the vendor unless the goods arrived, but the order for insurance is decisive as to that." . . . "The expiration of three months was to be the time of payment if the goods arrived; if they did not arrive, the law would imply a promise to pay in a reasonable time." In *Castle* v. *Playford* (2) the goods were to be paid for in cash on delivery, but the purchaser by the terms of the contract took upon himself "all risks and dangers of the seas," and from this it was inferred, that though the goods were lost by perils of the seas before delivery, the purchaser was still bound to pay for them.

So in the present case I infer, from the fact that it was intended that the plaintiff should insure, that the goods were intended to be at his risk in order to enable him to effect a valid insurance,

(1) 4 B. & C. 219. (2) Law Rep. 5 Ex. 165; Law Rep. 7 Ex. 98.

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and as nothing was said as to the time from which he was to effect the insurance, I infer that it was intended that he should insure by an ordinary policy, beginning the risk from the loading, and that the goods were considered by the parties to be at his risk from that time. The plaintiff, therefore, according to the authorities above cited, was bound to pay for the goods lost, and in this case has done so accordingly.

For these reasons I think that the judgment of the Court below ought to be affirmed.

The judgment of Blackburn and Lush, JJ., was delivered by

BLACKBURN, J. In this case the defendant is an underwriter for 100*l.* on a policy in the ordinary form of a Lombard Street policy "at and from Rangoon to any port or place of discharge in the United Kingdom or Continent" on the ship *Sunbeam*.

The subject-matter of the insurance is described as "5500*l.* (part of 6000*l.*) on rice as interest may appear. Amount of invoice and 15 per cent. to be deemed the value; average payable on every 500 bags."

The policy contained the usual printed words, "Beginning the adventure upon the said goods and merchandizes from the loading thereof on board the said ship." The *Sunbeam*, at Rangoon, foundered at anchor with 8878 bags of rice on board. And this rice was totally lost.

The question in the cause was whether the plaintiff was entitled to recover in respect of the loss of this rice from the underwriters, and if so, for what percentage. The decision of the Court below was that he was entitled to recover 100*l.* per cent. from each underwriter.

There was a minor point made that even if the underwriters were liable it was not for so great a percentage. For, if in calculating the amount at risk the invoice value is taken to mean the invoice as between the shipper and the purchaser, that, with the 15 per cent. added, would not amount to 6000*l.*, and the underwriters would be liable to make good something less than 100 per cent. If the phrase "invoice value" is to be taken as another expression for the ordinary shipping value, which includes not only the cost but the premiums of insurance, the value exceeded

6000*l*. It becomes unnecessary in the view which we take of this case to decide anything on this point. We only mention it lest it should be said we overlooked it.

The important issues were on the 3rd plea, denying the plaintiff's interest, the 4th plea alleging unseaworthiness, and the 5th plea denying the loss by perils of the seas.

On all these the plaintiff had a verdict subject to leave to enter a verdict for the defendant on the grounds that there was no evidence of loss by perils insured against, or that the evidence shewed that the ship was not seaworthy, and on the ground that there was no insurable interest, or to reduce the damages on such principle as the Court should lay down.

A rule nisi was accordingly obtained on those grounds, and also for a new trial, on the ground that the verdict was against the weight of evidence. After a long argument and much consideration, the Court of Common Pleas discharged the rule, giving their reasons in an elaborate judgment. (1)

Against this judgment the appeal was brought and argued on on the 19th, 21st, and 22nd June, before my Brothers Bramwell, Lush, Quain, Pollock and Amphlett, and myself.

During the argument we gave our judgment that the evidence was such as to make it a fair question for the jury whether the ship was or was not unseaworthy, and was or was not lost by perils of the seas, and therefore that the rule to enter the verdict for the defendants on those issues was properly discharged. The question whether the verdict was against the weight of evidence was not before us.

But on the question whether there was an insurable interest we took time to consider, and the majority have come to the conclusion that the judgment below was wrong on this point, and ought to be reversed for the following reasons:—

As the rice in question had been actually laden on board the *Sunbeam* at Rangoon, there can be no question that the adventure described in the policy had begun. But as the policy of insurance is a contract of indemnity, the plaintiff cannot recover unless he suffered a loss from the perishing of that rice, and that loss was

(1) Ante, p. 58.

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such as to be included in the subject-matter of the insurance, as described in the policy.

The first question, then, to be determined is, whether the plaintiff was so situated with respect to the rice in question at the time of its loss that he would, if uninsured, have suffered any loss from the destruction of the rice; and, if any loss, whether that loss was of such a nature as to be included in this policy.

The facts which are material as to this are not in dispute. The plaintiff Anderson had made a contract with Messrs. Borrodale, contained in a bought note set out in the 6th paragraph of the case. The material parts are these:—"Bought the cargo of rice per *Sunbeam* at 9*s.* 1½*d.* per cwt. cost and freight. Payment by sellers' draft on purchasers at six months' sight, with documents attached."

The *Sunbeam*, which had been taken up by Guben, Christian, & Co., the sellers of the cargo to Borrodale & Co., arrived at Rangoon within the time mentioned in the contract, and Guben, Christian, & Co. proceeded to put the rice on board. They had, by the 31st of March, when the ship was lost, put 8878 bags on board; but this was only a portion of what they intended to ship. The remainder—it does not distinctly appear whether 400 bags or 1600 bags—but, at all events, a substantial portion of what they intended to be the lading of the *Sunbeam*, was in lighters or on the shore, intended for the *Sunbeam*, but not yet on board of her.

The time for preparing the shipping documents had not yet arrived; and by the terms of the bought note, Anderson was to pay by accepting drafts with documents attached.

The question therefore arises, what loss, if any, did Anderson sustain by the perishing of this rice at this time? It was admitted by Mr. Williams in the argument, and, as we think, could not be disputed, that if the rice intended for the *Sunbeam*, and put on board the lighter, had perished before it was put on board, Anderson would have sustained no loss, his vendors being still bound, as before, to supply him with rice, though that which they had intended to give him had perished to their loss, not his, because it was then at their risk, not his.

It was not admitted by Mr. Butt, but was very faintly denied, that as soon as the intended lading was completed, and the

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shipping documents were either prepared, or things in such a position that they could be prepared, Anderson would have been bound to pay for the cargo, though from subsequent disaster it perished either at Rangoon or on its way home. We all think it is the plain intention of the parties to this contract that, from the time the lading was complete, at least, the rice was to be at the risk of Anderson, and that it is not material to consider whether he would have had the full property before the drafts were accepted. But there remains the disputed question whether each separate bag was at the risk of Anderson from the time it was put on board the *Sunbeam*, or whether it remained at the risk of the sellers until the whole intended loading was complete, and the shipping documents were ready, or at least everything was done to enable them to make out the shipping documents? This, we think, depends entirely on the intention of the parties to the contract, as appearing from it.

There is nothing to prevent the parties from agreeing that, as the goods are shipped bag by bag, each bag shall be at the risk of Anderson, though the payment is postponed till the whole is on board; and if they have sufficiently expressed such an intention, then *Castle* v. *Playford* (1) is an express authority in this Court that Anderson must bear the loss, though it occurred before the stipulated time for payment had arrived. In that case the words of the contract were express, and left no doubt that the intention was that the buyer was to bear the risk; but we think the same result follows if the intention sufficiently appears, though it is not in express terms.

On the other hand *Appleby* v. *Myers* (2) is an express authority that, if from the contract it appears that the intention of the parties is that the payment is to be only on the completion, nothing can be recovered, though that completion is prevented by an accident for which neither party is to blame. Both decisions are binding on us, even if we disapproved of them, but we agree with both.

In the present case there is nothing in the terms of the contract to indicate that the parties had present to their minds the possibility of a loss happening at the time when this did, and conse-

(1) Law Rep. 7 Ex. 98. (2) Law Rep. 2 C. P. 651.

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quently there are no words used expressly providing for it. We must collect the intention from the words used, applying to them the general rules which the Courts have from time to time adopted, as rules to enable them to ascertain the intention.

The cases bearing on this subject are collected in Mr. Benjamin's book on Sales, B. 2, chaps. 2 to 6. In *Gilmour* v. *Supple* (1), Sir C. Cresswell, delivering the judgment of the Privy Council, says, we think very truly: "It is impossible to examine the decisions on this subject without being struck by the ingenuity with which sellers have contended that the property in goods contracted for had, or had not, become vested in the buyers, according as it suited their interest; and buyers, or their representatives, have, with equal ingenuity, endeavoured to shew that they had, or had not acquired the property in that for which they had contracted, and judges have not unnaturally appeared anxious to find reasons for giving a judgment which seemed to them most consistent with natural justice. Under such circumstances, it cannot occasion much surprise if some of the numerous reported decisions have been made to depend upon very nice and subtle distinctions, and if some of them should not appear altogether reconcileable with each other. Nevertheless, we think that in all of them certain rules and principles have been recognized, by the application of which to this case we may be enabled to arrive at a correct judgment upon it." One of these rules is thus stated in Blackburn on Sales, p. 151: see Benjamin on Sales, p. 235. "The first is, that where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of these things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property." This is in effect repeated in the judgment in *Gilmour* v. *Supple* (2), and is, we think, consistent with all the cases.

Now the completing the lading so that shipping documents could be made out seems to us a thing to be done by the vendor for the purpose of putting the goods into a deliverable state, or, to substitute the language of Sir C. Cresswell, an act to be done by

(1) 11 Moo. P. C. 551, 566. (2) 11 Moo. P. C. at p. 568.

the seller for the benefit of the buyer, to place the goods in a state to be delivered, and, therefore, "until he has done it the property does not pass."

But we agree that this is only a primâ facie indication of the intention, and that it must yield to anything sufficiently indicating a contrary intention. We must, therefore, look to the contract to see if there are any indications of a contrary intention in this case.

It may be observed that risk and property generally go together, and consequently in many of the cases, though the important point was at whose risk is the thing, it is treated as if the sole question was, whose property is it? In the present case, however, the real question is, at whose risk was it? and we do not, therefore, attach any weight to the stipulation that the seller was to attach the shipping documents to the drafts, thereby certainly preserving to the sellers a lien on the goods till the drafts were accepted and the bill of lading handed over, and perhaps preserving in them, till then, the property, so as to enable them to confer a title on a purchaser for value without notice as good in equity, and preferable at law to that of Anderson. This would not prevent the risk from being on the purchaser from the time the loading was complete. Nor do we proceed on the ground that the word "cargo" has any technical sense requiring that the whole ship should be filled up. But we do proceed on the ground that the primâ facie rule of construction is that the parties intended that the risk should become that of the buyer, Anderson, when, and not till, the whole lading was complete, so as to enable the shippers, by getting the shipping documents, to call on the buyer to accept and pay for the cargo; and that there is nothing in this contract to rebut the presumption that such was the intention. We do not think that the fact that the vessel was designated, and that, unless under exceptional circumstances, the seller could not, without the consent of the shipowner, take any goods once on board out of her, affects the question as between the vendor and purchaser.

The Court below say that putting any rice on board the *Sunbeam* "was such an appropriation of the rice on board as to prevent the sellers from withdrawing that rice without the consent of the buyer."

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If we could see anything in the contract to give the buyer a right to object, we should think it indicated an intention that the property so put on board should be at the buyer's risk; but we cannot find anything to that effect. If we could see anything to indicate an intention that as each bag was shipped it should be at the buyer's risk, we should think it indicated an intention that it should not be taken out without his consent. But we cannot reason in a circle.

We have, therefore, come to the conclusion that no part of this rice ever was at the plaintiff's risk, and that he never could have been called upon to pay for it, notwithstanding its loss.

The Court below, after coming, by a somewhat different process of reasoning, to the same result, say that the plaintiff would, if the rice had not perished, have had an option to take and pay for it, and, therefore, had after the loss an option to pay for it and charge the underwriters with the loss. No one can dispute that the plaintiff might pay the sellers for the rice that perished, though not bound to do so, just as he might have paid them for any bags of rice that had been lost on board lighters, or in their warehouses on land, after they had been brought there in order to put them on board the ship. It might be a liberal thing to do so at his own expense.

But the decision below seems to affirm that after the loss the insured, though he had not sustained any loss, may elect to bear it, and pay at the cost of the underwriters. To this we cannot agree. The authority on which they acted, *Sparkes* v. *Marshall* (1), seems to us to be misapplied. In that case Bamford had written to Sparkes, the plaintiff, that Johns & Son, of Youghall, had engaged room in the *Gibraltar Packet* to take about 600 barrels of oats on his account. The plaintiff at once adopted this by directing insurance to be made on his account on oats per the *Gibraltar Packet* from Youghall to Southampton and Portsmouth. The judgment proceeds on the ground that this was an appropriation by Bamford, assented to by Sparkes, vesting these oats in Sparkes. It appears from the correspondence in the case that Bamford knew that the *Gibraltar Packet* was bound for Southampton only, whilst Sparkes thought she was bound for Southampton and Ports-

(1) 2 Bing. N. C. 761.

mouth, and also that Johns & Son shipped only 486 barrels of oats on account of Sparkes instead of about 600. It may be, though it is not quite clear, and the Court did not determine it, that these facts gave Sparkes a right to undo the appropriation to him and to divest the interest already vested in him, but he never did so. The decision we think involves the position that the underwriters had no right to call upon Sparkes to exercise, for their benefit after the loss, his right, if he had it, to undo and divest an interest vested in him before the loss.

But this is a very different proposition from saying that the assured had a right, after the loss, to vest in himself a right not vested in him before the loss, and so incur a liability to pay at the underwriter's expense. We do not think he could do so.

There is only one further point briefly stated in the judgment below, thus: "We are further of opinion that even if the property in the rice did not legally pass to the plaintiff, yet he had an insurable interest in it, because he had an existing contract with regard to it from the time of its being loaded on board, by virtue of which he had an expectancy of benefit and advantage, arising out of or depending on the safe arrival of the rice." This was more fully discussed on the argument before us. If the market was a rising market, the plaintiff would have derived benefit from the completion of the contract; if a falling one he would have sustained loss, and the loss of the *Sunbeam* put an end to this chance. We need not discuss whether, under a properly framed policy, the plaintiff could have insured this expectancy of profit. For the subject-matter of this insurance is on "rice," and though that is to be construed liberally as covering any interest in the rice, it cannot be construed as covering an interest in profits that might arise collaterally from a contract relating to the rice. For this it is enough to refer to *Lucena* v. *Crauford*. (1) The action was on a policy on ships and goods. Eight questions were asked of the judges. The eighth, set out at p. 278 of the report, was as to whether the commissioners had profits in respect of which they had an insurable interest, and then asks: "Can the policy of assurance in the first count of the declaration mentioned (i. e. a policy on ships and goods) be considered as a policy effected on

(1) 2 B. & P. (N. R.) 269.

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such interest of the commissioners, if such they had, and the same is an insurable interest?" The answer of the judges is stated at p. 315: "The learned judges were unanimously of opinion that the policy in question could not be considered as a policy on profits, having been expressly declared upon as a policy upon the plaintiff's interest in the ships and goods themselves, and that if it had been intended as a policy on profits it should have been so stated." This we think decisive of the question; but we may refer to *Royal Exchange Assurance* v. *McSwinney* (1) as shewing how important it is, not only to have an insurable interest, but to have the subject-matter of insurance so described in the policy as to embrace that interest.

For these reasons we think that this rule should have been absolute to enter the verdict for the defendant, on the third plea denying the insurable interest; and that the judgment should so far be reversed.

The judgment of Bramwell, Pollock, and Amphlett, BB., was delivered by

BRAMWELL, B. Many questions were disposed of on the argument; as to what remained, we are of opinion that the defendant below is entitled to judgment, on the ground that the plaintiff below has shewn no interest in the subject-matter of the insurance at the time of the loss.

By the contract between the plaintiff and the sellers of the rice, the plaintiff was to have the cargo of the *Sunbeam*, and to pay for it by acceptances at six months with the bills of lading attached. It is manifest, therefore, that until the cargo was completed, and the bills of lading could be given, the plaintiff, by the mere bare words of the contract, was not liable for its price, and had no property in any part of it that might be on board, except contingently on the cargo being completed. The cargo never was completed. But it was suggested that, as the completion of the cargo became impossible through no default of the sellers, there arose by implication a right on their part, not expressed in the mere bare words of the contract, to be paid by the buyer for so much as had been loaded. For this contention we see no ground

(1) 14 Q. B. 646.

in reason or principle. The plaintiff also was in no default, and there is no reason why the loss of goods, in which certainly he had no property but for the loss, should fall on him. It would be to make him liable for the loss because there was a loss. Further, we consider this concluded by authority. *Appleby* v. *Myers* (1) is in point. It was indeed said that here there was a reason why the plaintiff should bear the loss, viz. the inconvenience which would follow if it should be held that the plaintiff should insure after the cargo was complete, and that the sellers must insure for their protection during its completion. But this received its answer at the Bar, viz. that the same inconvenience would result as to the insurance of the rice on its passage from Rangoon to the ship, damage or loss during which certainly would not fall on the plaintiff. A line must be drawn somewhere, and may well be at the time when the cargo is complete. Then it is said that the contract of purchase shews that the plaintiff is to insure, and that consequently the rice was at the plaintiff's risk, which involved that he was to pay for it; and *Castle* v. *Playford* (2) was cited. We entirely agree with that case. But the argument assumes that the rice was to be at the plaintiff's risk before the cargo was completed, and begs the question. The rice was to be at the plaintiff's risk when the cargo was completed (and perhaps, as we shall next mention, to some extent during its completion), but it was not to be his property nor at his risk till completion, save possibly, as was suggested, viz. that if any of the rice during the loading, and after it was on board, had been damaged, the sellers might complete the cargo, and insist that they had fulfilled their contract, by shipping merchantable rice; and that the plaintiff must take the damaged rice, if damaged after it was put on board, and so that the plaintiff had an interest in respect of which he might insure. But assuming that he would have been bound to take a cargo damaged as supposed, he would only be so bound when the cargo was completed. The interest supposed, therefore, and the possibility of loss are contingent—contingent on the completing of the cargo. Therefore he had no interest from this at the time of the loss.

As to the argument that the plaintiff had an option to take this

(1) Law Rep. 2 C. P. 651. (2) Law Rep. 5 Ex. 165; 7 Ex. 98.

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rice, which he might exercise after it was lost, we cannot, with great respect, agree to it. It seems strange that it should rest with the plaintiff to make the underwriters liable or not at his pleasure. But the plaintiff had no such option. No doubt it exists in some cases, and one party to a contract may have a right to insist on performance or to refuse to perform at his option. But that is where there has been some default in the other party. Here there has been none. If the sellers had loaded a short cargo, and the plaintiff had not been bound to take it, no doubt he might have claimed it, and the sellers could not have been heard to say that they, the sellers, had broken their contract by loading a less quantity than agreed, and so the buyer was not entitled to it. But that is not the case here. The sellers might have refused to give bills of lading to the plaintiff and to draw on them for the price of what was shipped, and probably would have done so had they been well insured. It is manifest that what occurred was a new bargain between the plaintiff and the sellers, and might as well have been made between the sellers and a stranger. *Sparkes* v. *Marshall* (1) does not apply. There the property had vested in the buyer. The seller may have been in default for sending the oats to Southampton instead of Portsmouth, but that did not take away the right of the buyer to insist, as he did, on having them.

Then it is said that the plaintiff had an insurable interest in the profits he would have made. He had, but he has not insured profits, and therefore cannot recover on that ground. This was settled by the unanimous opinion of the judges, and by the House of Lords, in *Lucena* v. *Crawford* (2), and has been well known and acted on ever since.

The plaintiff had no interest in the subject-matter of insurance at the time of the loss, and so is not entitled to recover.

The judgment must be reversed.

Judgment reversed.

Attorneys for plaintiff: *Parker, Watney, & Co.*
Attorneys for defendant: *Hollams, Son, & Coward.*

(1) 2 Bing. N. C. 761. (2) 3 B. & P. 75; 2 B. & P. (N. R.) 269.

MURRAY AND ANOTHER *v.* MACKENZIE AND ANOTHER. 1857 *May* 22.

Bill of Sale—Misdescription of Residences of Maker and attesting Witness—17 & 18 Vict. c. 36, s. 1.

In a bill of sale the maker was described as "W. C., of No. 37, Malpas Road, Deptford," and the attesting witness as "E. W., 2, South Terrace, Hatcham Park Road;" and in the affidavit filed with it the deponent stated that "the said W. C. resided at No. 73, Malpas Road, Deptford," and that he himself resided at "3, South Terrace, Hatcham Park Road:"—

Held, a fatal misdescription.

4 C P D. 3
4 Q B D. 6

INTERPLEADER ISSUE to try whether certain goods and chattels in 37, Malpas Road, Lewisham, seized in execution by the sheriff of Kent under a writ of fi. fa. upon a judgment of this Court, obtained by the defendants in an action against William Cave, were, or some part thereof was, at the time of the seizure, the property of the plaintiffs as against the defendants.

At the trial before Denman, J., at the sittings in Middlesex after Trinity Term, 1874, the plaintiffs in support of their claim relied upon a bill of sale, bearing date the 13th of September, 1871, whereby the goods in question were conveyed to them by the execution debtor.

In the bill of sale, the maker was described as "William Cave, of No. 37, Malpas Road, Deptford, in the county of Kent, builder," and the attesting witness was described as "Edmund White, 2, South Terrace, Hatcham Park Road, New Cross, commission-agent." And, in the affidavit filed with the bill of sale, the deponent swore that he was present and did see William Cave, in the said bill of sale mentioned, and whose name was signed thereto, sign and execute the same on the said 13th of September, in the year aforesaid, and that the said William Cave "resides at No. 73, Malpas Road, Deptford, in the county of Kent, and is a builder;" and further "that the name Edmund White set and subscribed as the witness attesting the due execution thereof is of the proper handwriting of me this deponent, and that I reside at 3, South Terrace, Hatcham Park Road aforesaid, and am a commission-agent."

It was objected on the part of the defendant that there was a

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fatal variance between the description of the places of residence of the maker of the bill of sale and of the attesting witness as stated in the bill of sale itself, and that contained in the affidavit.

The learned judge overruled the objection, and directed a verdict to be entered for the plaintiffs.

Nov. 7, 1874. *Day, Q.C.*, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendants, or for a new trial, on the ground of misdirection in this, that the description of the maker of and attesting witness to the bill of sale was wrongly stated in the affidavit upon registration, and that the judge should have so held.

May 22, 1875. *Warton* (*Joyce, Q.C.*, with him) shewed cause. An imperfect description in the affidavit may be cured by a reference to the bill of sale: *Jones v. Harris.* (1)

[GROVE, J. In that case there was an imperfect description of the party in the affidavit; here it is an erroneous description. No one, looking at the two instruments, would know which was right, the bill of sale or the affidavit.]

The statute is satisfied if the description is *reasonably* sufficient. If the maker of the bill of sale had been described as of "Malpas Road, Deptford," without any number, that would have been enough; there being evidence that he was well known there. A letter so addressed would have reached him. No one could have been misled by the erroneous statement.

[LORD COLERIDGE, C.J. The question is whether the terms of the statute are satisfied. The object of the enactment is that a searcher may be able to identify the party without trouble.]

It would be no great hardship if the person seeking information had to go to both numbers. In *Briggs* v. *Boss* (2), the description of the attesting witness in the affidavit was, "I reside at Hanley, in the county of Stafford, and am an accountant;" it appeared that he was not an accountant, but only a clerk to an accountant; and yet the description was held to be sufficient. Blackburn, J., there says: "The statute requires that together with the bill of sale there should be filed an affidavit giving the description of the residence and occupation of the person making the bill of sale, and

(1) Law Rep. 7 Q. B. 157. (2) Law Rep. 3 Q. B. 268.

of every attesting witness to it. The object was, that, when a bill of sale is filed, such a description of the person giving it and of the witnesses to its execution should be given as that persons who may have had dealings with the grantor, or are otherwise interested in the matter, may receive such information as would enable them to trace out who is the person that is giving the bill, and who are the attesting witnesses, so as to ascertain the bona fides of the transaction. The question is, what is such a sufficient description? If we were to require the minutest accuracy in these particulars, we should often upset an honest transaction; on the other hand, if we were to allow great looseness, or any misdescription, we should be enabling parties to evade the statute. The description, as it seems to me, must be such as would enable a man readily and without difficulty to find out who the parties are. It is not enough that the description would not mislead; there must be sufficient to guide the person in his search." The question is whether the descriptions here given are not sufficient within that rule. Lush, J., adds: "Primâ facie the description would not be sufficient; but the evidence shews that post letters with no fuller address than 'Hanley' constantly reach him,"—the attesting witness. *Hewer* v. *Cox* (1) also shews that the real principle is, that the description shall be such as that persons looking at the documents could not be misled.

Lumley Smith, contrà, referred to *Larchin* v. *North Western Deposit Bank*. (2) There, the grantor of a bill of sale was described in the affidavit filed under the Bills of Sale Act, as an "accountant." He was in fact a clerk in the accountant's department at the Euston Square station of the London and North Western Railway Company, but in his leisure time was occasionally employed to balance tradesmen's books; and this was held to be an insufficient description. Blackburn, J., there said: "The object of the Act is, to give notice to all who are likely to deal with the grantor of the bill of sale; not to enable a person who is curious on the matter to trace him out, but to enable one who is asked to give him credit to know at once, by looking at the register, whether the person he is asked to give credit to has executed a bill of sale. The description given here would not

(1) 3 E. & E. 428; 30 L. J. (Q.B.) 73. (2) Law Rep. 10 Ex. 64.

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convey such information; and to allow it to be good would in effect strike out of the Act the words which require a description of the grantor's 'occupation.' In *Briggs* v. *Boss* (1) we went quite as far as we ought to go."

LORD COLERIDGE, C.J. I am of opinion that this rule should be made absolute. The question is whether there has been a compliance with s. 1 of the Bills of Sale Act, 17 & 18 Vict. c. 36, which requires the bill of sale, or a copy, to be filed in the Court of Queen's Bench twenty-one days after the making or giving thereof, "together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, and of every attesting witness to such bill of sale." Here, the affidavit filed in pursuance of the statute describes the residence of the maker of the bill of sale as "No. 73, Malpas Road, Deptford," and that of the attesting witness as "No. 3, South Terrace, Hatcham Park Road, New Cross;" whereas the residence of the former as stated in the bill of sale was "No. 37, Malpas Road, Deptford," and that of the latter "No. 2, South Terrace, Hatcham Park Road, New Cross:" and we are called upon to say whether that is a true description of the parties within the meaning of the statute. I must confess I should have thought the matter too clear for argument. To say that we may reject the numbers altogether, is a mere fallacy. The object of the Act, as is said by Blackburn, J., in *Larchin* v. *North Western Deposit Bank* (2), is, "to give notice to all who are likely to deal with the grantor of the bill of sale; not to enable a person who is curious on the matter to trace him out, but to enable one who is asked to give him credit to know at once, by looking at the register, whether the person he is asked to give credit to has executed a bill of sale." The description here is not, as in *Jones* v. *Harris* (3), an insufficient statement of the residences of these parties, but a misstatement. If an inquirer went to No. 73, Malpas Road, or to No. 3, South Terrace, to look for the maker of the bill of sale or the attesting witness, he would find some one else living at both

(1) Law Rep. 3 Q. B. 268. (2) Law Rep. 10 Ex. 64.
(3) Law Rep. 7 Q. B. 157.

those places. The bill of sale does not, as in that case, supply a defect or imperfection in the affidavit; but the one contradicts the other. Both cannot be right, and there is nothing on the face of them to shew which is right. This, no doubt, is an extremely technical objection. But it is a strictly valid one. There is a misdescription of that which the statute requires to be described truly.

GROVE, J. I am of the same opinion. I am at a loss to see what could be said to be a non-compliance with the statute if this is not. In *Jones* v. *Harris* (1), the affidavit did not contain all that was necessary; and the insufficiency was allowed to be supplied by a reference to the bill of sale. In *Briggs* v. *Boss* (2) the mistake was in an unnecessary addition to the description of the attesting witness; and, if that case did apply, the case in the Exchequer Chamber, *Larchin* v. *North Western Deposit Bank* (3), very much shakes its authority. Here, the statute clearly has not been complied with.

ARCHIBALD, J. I am of the same opinion. The main object of the Act was to defeat secret bills of sale. And, in order to carry out that object, it requires that with every bill of sale there shall be filed an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, and of every attesting witness to such bill of sale. The documents filed here do not in any sense contain a description of the residences of the maker of the bill of sale and of the attesting witness, and therefore the requirements of the statute have not been complied with.

LINDLEY, J. I am of the same opinion. The statute is imperative. If the bill of sale is filed without a substantially strict compliance with its requirements, it is to be null and void.

Rule absolute.

Attorney for plaintiff: *W. E. Barron.*
Attorneys for defendant: *Crook & Smith.*

(1) Law Rep. 7 Q. B. 157. (2) Law Rep. 3 Q. B. 268.
(3) Law Rep. 10 Ex. 64.

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May 24.

HOGARTH and Another *v.* WHERLEY.

Principal and Agent—Authority to draw Bills—Evidence of Payment.

M., the plaintiffs' traveller, having received an order from the defendant, a customer, the plaintiffs wrote to M. expressing their unwillingness to execute the order until a former account was settled, adding "We should like to draw upon him for the former," mentioning the amount. M. shewed this letter to the defendant, and obtained from him an acceptance at three months' date payable to "my order," with a blank for a drawer's name. The bill was paid at maturity, but not to the plaintiffs, M. having filled up the blank with his own name, and fraudulently negotiated the bill.

In an action to recover the value of the goods for which the bill had been given, it was proved that upon one occasion at least the defendant had accepted a bill drawn by M. in blank, which had been received by the plaintiffs as payment; but there was no evidence to shew the form of that bill:—

Held (Grove, J., doubting), that neither the letter nor the former dealing was any evidence of authority in M. to draw the bill in question, so as to sustain a plea of payment.

Action for goods sold and delivered, and for money due upon accounts stated. Pleas, never indebted, and payment.

The cause was tried before Denman, J., at the sittings in London after Trinity Term, 1874. The facts were as follows:—The plaintiffs were provision merchants in London. The defendant was a provision agent at Newcastle-upon-Tyne. One Montgomery, the plaintiffs' traveller, received orders for goods from the defendant, and from time to time obtained payment in the ordinary course, in cash or by cheque. In June, 1873, Montgomery received from the defendant, who was then indebted to the plaintiffs in the sum of 30*l.* 2*s.* 4*d.* for goods already supplied, an order for a ton of raspberry jam at 49*s.* per cwt.; whereupon the plaintiffs on the 10th of June wrote to the defendant, as follows:—

"Dear Sir,—We are in receipt of your esteemed order given to Mr. Montgomery; but, as we have never had such large dealings before with you, we shall feel obliged if you will either hand us a reference or be good enough to deduct cash discount and remit us for statement inclosed, and immediately on receipt of remittance we can forward the jam on order."

An account was inclosed of former transactions; and on the same day the plaintiffs wrote to Montgomery, as follows:—

"Dear Sir,—Your order to hand for H. G. Wherley, which

shall be attended to; and, pending inquiry as to our stock of jams, we have taken the liberty of writing to him to ask for a reference, as we know little or nothing of him to allow his account to attain to such extended proportions. We have hitherto only done with him to the amount of 20*l.* in all; and, as it stands, and we have an amount of 30*l.* odd to his debit, and the order to hand will make another amount of 49*l.*, we should therefore like to draw upon him for the former, to the end of the quarter.

"We are, of course, very much obliged to you for handing in this order; but, at the same time, we do not see what position we hold in allowing you to take orders. We are extremely sorry to lose your services; and, if you will refer to your letter of the 6th ult. (1), you informed us virtually that you had ceased to represent us, consequent upon which we appointed another gentleman as our agent in your place; and, if he knew we were still continuing to receive orders from you, we have every reason to believe he would think it strange conduct on our part. We feel compelled, therefore, to have the matter settled at once, and shall be glad to hear what you may have to say in the matter."

Montgomery immediately upon the receipt of this letter, which he shewed to the defendant, drew a bill upon him in this form,—"Three months after date pay to *my order* the sum of 30*l.* 2*s.* 4*d.*, value received," which bill the defendant accepted, and paid at maturity; and this was relied upon to support the plea of payment. The bill, however, never reached the plaintiffs' hands, it having been fraudulently negotiated by Montgomery; and the plaintiffs repudiated the authority of Montgomery to receive payment in bills.

The defendant swore that, upon one former occasion,—and he thought upon two occasions,—he had accepted a bill or bills drawn by Montgomery, which had been received by the plaintiffs in payment for goods supplied by them to him. This was admitted on the part of the plaintiffs as to one bill; but they insisted that that bill was drawn in blank, and was made payable to "our order;" and there was a conflict of evidence as to whether the bill in question had a drawer's name subscribed to it at the time of its acceptance by the defendant.

(1) In which Montgomery had intimated his intention no longer to act as the plaintiffs' agent.

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The learned judge left three questions to the jury, which, with their answers, were as follows,—

1. Had Montgomery authority to take payment by a bill accepted, but without a drawer's name? Yes.

2. Was this bill when accepted by the defendant signed by Montgomery or drawn in blank? In blank.

3. Had the plaintiffs so behaved in their dealings with the defendant as to make the transaction represented by this bill payment? Yes.

A verdict was thereupon entered for the plaintiffs for 30*l.* 2*s.* 4*d.*, the learned judge being of opinion that at all events this bill to Montgomery's own order was no payment,—reserving leave to move.

Joyce, Q.C., in Michaelmas Term last, accordingly obtained a rule nisi to enter a verdict for the defendant, on the ground that there was evidence to support the finding of the jury upon the plea of payment.

May 24, 1875. *Holl* and *Mears* shewed cause. There was no evidence to shew that Montgomery had authority to draw bills generally on the plaintiffs' account; or, at all events, not in the form of the acceptance in question. The letter of the 10th of June, 1873, which it was proved was shewn to the defendant at the time he accepted the bill, gave no such authority; the words were, "*We* should like to draw on him." And the evidence of former dealings did not establish an authority to draw in this form; there being nothing to shew the form of the bill or bills on those occasions.

Gainsford Bruce (*Joyce, Q.C.*, with him), in support of the rule. There was evidence for the jury that Montgomery had at least upon one former occasion drawn upon the defendant in payment for goods supplied to him by the plaintiffs a bill which the defendant had accepted in blank.

[ARCHIBALD, J. There was no evidence to shew the terms in which the former bill or bills were drawn. For anything that appears they were drawn in the usual way, with a blank for the name of the plaintiffs' firm, and made payable to the order of the firm.]

It is enough that there was some evidence for the jury. If Montgomery had authority to draw, it would be for him to settle the form of the draft. If the plaintiffs had intended to have a bill in a particular form, they would have drawn it themselves, and sent it to Montgomery to get it accepted. The case of *Henderson & Co.* v. *Le Comptoir d'Escompte de Paris* (1) shews the latitude of construction allowed in mercantile instruments.

[LORD COLERIDGE, C.J. That case is a very long way off this.]

The letter of the 10th of June, coupled with the prior dealings between the parties, clearly amounted to evidence that Montgomery had a general authority to draw bills, which must of necessity be drawn in blank.

[LORD COLERIDGE, C.J. The letter per se gives no authority to draw a bill like this: and the prior dealings are left altogether in the dark as to this matter.]

A slight variance in the form of the instrument will not prevent its falling within the authority. And, if there was any evidence for the jury, their finding disposes of the case in the defendant's favour.

LORD COLERIDGE, C.J. This was an action for goods sold and delivered, to which there was a plea of payment. At the trial certain questions were left to the jury, their answers to which, provided there was evidence proper to be left to them, in effect amounted to a verdict for the defendant. A verdict, however, was entered for the plaintiff for 30*l.* 2*s.* 4*d.*, leave being reserved to the defendant to move to enter the verdict for him if there was no evidence to support the finding. The facts were these:—The plaintiffs were manufacturers of jams. Through a traveller named Montgomery they had had dealings with the defendant to some extent. The question arose upon one disputed dealing which the defendant had paid for in one sense by a bill of exchange, which had been met by him at maturity, but the amount of which had never reached the hands of the plaintiffs; the bill having been so drawn and accepted as to enable Montgomery to negotiate it, and Montgomery having decamped. The question was, whether under

(1) Law Rep. 5 P. C. 253.

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the circumstances the payment so made was a payment to the plaintiffs. Now, the dealing we have to consider took place after a correspondence upon the subject between the plaintiffs and Montgomery and the defendant. The letter which was relied on by the defendant as shewing that Montgomery, the plaintiff's agent or traveller, had been authorized by his principals to receive payment in the way he did, was dated on the 10th of June, 1873. It was also said that there had been other dealings between the parties in the course of which the defendant had accepted bills drawn substantially in the same form as the bill in question, and which bills had been treated by the plaintiffs as payment: and it was insisted that this was evidence at least that the plaintiffs had so dealt with the defendant through Montgomery that they were estopped from saying that payment by a bill in the form of this bill was not a payment to them.

Now, what was the evidence which was offered to prove the defendant's plea of payment? He swore that upon one occasion certainly, but he thought upon two,—and for the purpose of my judgment I will assume that two were proved,—he had, in payment of a debt for goods supplied to him by the plaintiffs, accepted a bill handed to him for that purpose by Montgomery, with a blank for the drawer's name. The particular form of the bills on those occasions was left entirely in ambiguo. The bill in question was "pay to *my* order," and was afterwards filled up by Montgomery with his own name, and indorsed and negotiated by him, and the proceeds received by him. Is that, without more, evidence of authority given by the plaintiffs to Montgomery, or of conduct whence authority to him could be inferred, to obtain an acceptance to a bill drawn like this bill, so as to constitute a payment? I think not. It does not in my judgment amount to any evidence that Montgomery was authorized by the plaintiffs so to deal on their account. The probabilities are all the other way. The ordinary course of business, if Montgomery were to draw bills on customers, would have been to draw them payable to "our order," and to leave the principals to fill up the blank with the name of the firm. If that course had been followed, no fraud could have taken place. If the defendant intended to rely upon a course of dealing as evidenced by the former bill or bills,

he should have been prepared to shew the precise form in which they were drawn. I think the evidence which was given was no evidence of authority in Montgomery, or of conduct amounting to authority, or, rather, of conduct on the part of the plaintiffs which estopped them from denying the authority of Montgomery to draw a bill as he did. I think the defence wholly failed. I do not rest my judgment upon any affirmative evidence that no authority in fact was given. There undoubtedly was evidence from which the jury might have inferred that Montgomery had authority to receive a bill in payment without a drawer's name to it. But does the letter of the 10th of June, which, it appears, was shewn to the defendant before he gave his acceptance, confer authority upon Montgomery to take a bill in this particular form? It gives reasons why the plaintiffs were desirous not to extend the credit beyond a certain limit, and goes on: "We should therefore like to draw upon him for the former" (that is, the amount of goods already delivered,) "to the end of the quarter." The bill tendered to the defendant for his acceptance was not a bill drawn by the plaintiffs; and, further, it was drawn payable, not to their, but to "my" order. Taken by itself, the letter therefore conferred upon Montgomery no authority to take a bill in this form, which would impose upon his principals the necessity of going out of the ordinary course, and, instead of putting the name of their firm as drawers and indorsers, compelling them to authorize one member of the firm to sign as drawer. Therefore, as I have already said, neither was there on the face of that letter or by any course of dealing as to former bills any authority conferred upon Montgomery to act as he did upon this occasion. Consequently there was no evidence upon which the jury could properly draw the conclusion that the receipt by Montgomery of a bill in this form was authorized by the plaintiffs expressly, or by estoppel, as it is called. I therefore think the verdict was properly entered for the plaintiffs, and that this rule should be discharged. It is of the highest importance, as it seems to me, in cases of this kind, where an extraordinary course of dealing is relied upon, that the evidence should be distinct and clear. Here, not only do I find the evidence of authority by course of dealing not distinct and

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clear, but I find no evidence at all. I think my Brother Denman's direction was quite right.

GROVE, J. I have, during the argument of this case, entertained considerable doubts; and I cannot say that they are entirely removed; but my mind is so nearly balanced that I do not upon the whole differ from the rest of the Court. I believe my Lord and my two learned Brothers are agreed that, if the bill in question had been drawn in blank, payable to "our" instead of "my" order, there would have been evidence of authority in Montgomery to take payment in this way. The ground of my doubt was this. If Montgomery was authorized to take a deferred payment, and there was any evidence that he was authorized to draw bills in blank, if he, by mistake or fraud, inserted a wrong word in the bill, without the attention of the defendant being called to the fact, I entertain some doubt whether he was not acting substantially within the scope of his authority as agent, to make his act the act of his principals. That would be like the case of an agent with a general authority a little exceeding it. My doubt, however, is not sufficient to induce me to dissent from the decided opinions of the rest of the Court.

ARCHIBALD, J. I entirely and unhesitatingly agree with my Lord. There was clear proof of a debt due from the defendant to the plaintiffs for goods sold and delivered. It was the defendant's business, therefore, to discharge himself of that debt. He attempts to do so by shewing a blank acceptance given by him to Montgomery, the plaintiffs' traveller, which has since been paid, but which never reached the hands of the plaintiffs. There was evidence that Montgomery was authorized to receive payments on account of his principals; but that authority would be limited to the receipt of payments in cash, in the absence of circumstances to shew that the agent had a more extensive authority: Story on Agency, § 98. There must be express authority in the agent to receive payment otherwise than in cash, or circumstances from which a more enlarged authority may be implied. The defence here rested upon a letter of the 10th of June, 1873, and upon evidence of a previous course of business as to bills. Whether or

not the letter of the 10th of June gave Montgomery express authority to take the bill in question must depend upon its terms. The words relied upon are, "We should, therefore, like to draw upon him for the former [account] to the end of the quarter." Clearly those words of themselves confer no authority upon Montgomery to draw a bill upon the defendant otherwise than payable to the firm. But the defendant further relied upon evidence which he himself gave of payments having upon one or two former occasions been made by him to Montgomery by bills without a drawer's name, which had been adopted and treated by the plaintiffs as payments. No evidence, however, was given to shew the form in which those bills were drawn. The presumption would be that they were drawn in the ordinary way, payable to the order of the firm. It lay upon the defendant to shew that they were drawn in a form which would afford evidence of authority in Montgomery to draw this bill as he did, "pay to my order." The defendant cannot be allowed to take advantage of his own laches. The difference between "my order" and "our order" was obviously a material and important one. The former would require the blank to be filled up with the name of an individual drawer; and, if a bill were handed to the plaintiffs in that form, it would be necessary for them to alter their usual course of business, and to authorize one member of the firm to sign it in his own name and indorse it to the firm. This is in truth an attempt to extend the agent's authority. Neither upon the letter of the 10th of June, nor upon the ground of the former alleged dealings, do I think there was any evidence to support the plea of payment.

LINDLEY, J. I am of the same opinion. It must be borne in mind that this action is brought by the plaintiffs as partners; and that, to sustain his plea of payment, the defendant was bound to prove a payment to the firm. He seeks to do so by shewing that he accepted and afterwards paid a bill drawn upon him in blank by Montgomery, payable to "my order." It was for the defendant to shew that Montgomery was authorized by his principals to draw a bill in that form. Evidence of real authority was wholly wanting; and ostensible authority could not be made out by shewing that bills drawn upon the defendant by Montgomery in

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blank upon former occasions were adopted by the plaintiffs as payment, without shewing in what form those bills were drawn. In the absence of evidence to support the plea, therefore, I am of opinion that the verdict was properly entered for the plaintiffs.

Rule discharged.

Attorneys for plaintiffs: *Nicholson, Nicol, & Son.*
Attorneys for defendant: *Patteson, Wigg, & Co.*

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June 8.

EX PARTE BANYARD.

Attorney—Articles of Clerkship—Inrolment nunc pro tunc—6 & 7 Vict. c. 73, s. 8.

The mere failure to obtain payment of a debt due to the clerk at the time of his entering into articles, so as to enable him to pay the stamp-duty and inrol the articles and affidavit within the time limited by the statute, is not such a disappointment of a "reasonable expectation" that he would be prepared with the money in due time as will induce the Court to allow the articles to be inrolled nunc pro tunc.

HENRY HILL BANYARD, an articled clerk, in Easter Term last applied to the Court of Queen's Bench for leave to inrol his articles, dated the 19th of December, 1873, so that the service under them might be computed from that date, notwithstanding default had been made in stamping and inrolling them within the six months prescribed by the statute.

That application was founded upon an affidavit sworn on the 5th of May last, wherein, after setting forth the names of several solicitors whom he had served as clerk since 1859, he deposed as follows:—

"2. In February, 1872, I entered into the employ of Messrs. Mardon & Morten, as managing-clerk, at a salary of 150*l.* per annum. The senior partner, Mr. Mardon, died in July in the same year, and Mr. Morten then becoming the sole partner agreed (in 1873) to give me my articles, continuing on at the same salary, and on my paying all stamp-duties and fees connected therewith. At this time it was probable that my principal, Mr. Morten, would very shortly take a partner into his business, as he had been nego-

tiating for one; and, had he done so before I obtained my articles, he might not then have been in a position to have given them to me, and I should have lost the opportunity which then presented itself of obtaining for myself a position.

"3. In the years 1872 and 1873 I advanced to my brother William B. Banyard, of Higham Hill, Walthamstow, who for some years past had been engaged on parliamentary work and in the promotion of joint-stock companies on co-operative principles, sums of money at various times, at his request, by way of loans to him, and which sums amounted in the whole to between 130*l.* and 140*l.*, and upon the understanding that I was to be repaid as I required the same. Immediately on my principal, Mr. Morten, agreeing to my having articles under him, I communicated the fact to my brother, and the circumstances under which I was to have the same, and requested him to let me have at least 60*l.* of the money owing to me, to make up the amount I required to stamp the articles, and which he promised to do in the course of the next fortnight, which was then in November, 1873. When the period named by my brother arrived, I went to his office, in Bell Yard, Doctor's Commons, and reminded him of his promise, and he replied that he was not then quite prepared to keep it, but would be in a very short period thence. About the middle of the following month of December, I again saw my said brother, and asked him for the money I required, and told him that the arrangements for my articles having been finally settled between my principal and myself, it was necessary that I should thereupon carry out the same, and he answered me that his business arrangements were such that in the following spring he should be receiving a considerable sum of money, and would then repay me all, and urged me to enter into articles at once, and the stamp penalty of 10*l.* thereby incurred he would, in consequence of his inability to pay me at the then present time, give me with the re-payment promised in the Spring of the following year.

"4. Under these circumstances, I, on the 19th of December, 1873 (having previously informed my principal, Mr. Morten, that I had been promised by my brother sufficient money to enable me to stamp them within the six months allowed), entered into articles of clerkship with Mr. Morten for three years, and have

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duly served him from such date to the present time, as will appear by his certificate hereunto annexed.

"5. In April of last year, about the time when my said brother William B. Banyard had promised me a return of the money owing to me by him, to stamp my said articles with as aforesaid, he left London for New York, in the United States of America, to carry out some business there, and did so without fulfilling his said promise to me either wholly or in part; and up to the present time he has not returned to England, nor has he paid me any of the money so owing to me by him.

"6. My omission to stamp the articles arose purely out of the circumstances before stated. I fully believed when I entered into them I should have been able within the first six months of the term to have paid the stamp-duty through the means promised me by my said brother as aforesaid. I am in the thirtieth year of my age, and I have been in the practice of the profession continuously (with the exception of the short interval which arose through illness, as mentioned in paragraph 1) upwards of fifteen years, for eight of which I have acted as managing-clerk. I have only within the last fortnight been able to pay the said duty of 80*l.*, which I have paid, together with a penalty of 20*l.*; and on the 23rd of April last I filed with the proper officer of this Court an affidavit of the due execution of the said articles, which I did not enter into or refrain from stamping at the right time with any fraudulent design or in any speculative sense, but with the full intention of paying, and a confident belief or expectation (the money being justly owing to me by my said brother as before mentioned) of being able to pay the duty within the proper time."

In support of the present application an additional affidavit was produced, in which the applicant swore as follows:—

"On my brother William B. Banyard leaving this country for New York in April, 1874, as stated in the 5th paragraph of my affidavit sworn on the 5th of May, 1875, and acquainting me definitively of his inability prior to setting out on his journey to perform his promise to me to repay the money which I had advanced to him on loan, or any part of it, I at once set about making efforts to obtain the money elsewhere," naming several persons to whom applications had been made unsuccessfully.

"3. I applied to other sources among my relatives and friends, where I thought it probable that I might procure the amount I required; and up till last month (April), when, with the assistance of a friend and my own accumulated savings, I was enabled to stamp the articles and pay the 20*l.* penalty thereon, I did not in any way relax my efforts to procure the amount. The delay has not arisen through any fault of my own, but solely in consequence of the disappointment I experienced by my said brother not keeping faith with me in the re-payment of the loan I made to him, as before mentioned. I did not enter into the said articles in any speculative way, nor with any vague impression that I should from some source be enabled to stamp the said articles within the six months from date, to admit of inrolment in due course; but, on the contrary, the sum of from 130*l.* to 140*l.* mentioned in the third paragraph of my former affidavit was justly due and owing to me from my said brother, and at the time of execution of the said articles I fully believed in and relied on his promise and ability to repay me in the Spring of last year, as mentioned in my said former affidavit."

Morten, upon these materials, made a similar application to thi Court. The rule to be deduced from all the recent cases is, that the Court will permit articles of clerkship to be inrolled nunc pro tunc, and the service thereunder to be computed from the date of their execution (the duty and penalty under 19 & 20 Vict. c. 81, s. 3, being paid), where the omission to stamp and inrol them at the proper time has been the result of some accidental or unforeseen emergency: but that the mere disappointment of some vague hope or expectation of obtaining the means of paying the duty in time will not be allowed as an excuse for a non-compliance with the statute: see *Ex parte Bishop* (1), *In re Breden* (2), *Ex parte Jones* (3), *Ex parte Darville* (4), *Ex parte Blades* (5), and *In re Sayer*. (6) The language of Erle, C.J., in *Ex parte Jones* (7), is precisely applicable to this case. "Uniformly," he says, "whilst

(1) 9 C. B. (N.S.) 150; 30 L. J. (C.P.) 48. 7 Jur. N.S. 243.

(2) 12 C. B. (N.S.) 351; 31 L. J. (C.P.) 321. 8 Jur. N.S. 937

(3) 14 C. B. (N.S.) 301.

(4) Law Rep. 2 C. P. 244.

(5) 44 L. J. (C.P.) 115.

(6) Ante, p. 569.

(7) 14 C. B. (N.S.) at p. 304.

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I was in the Court of Queen's Bench, and since I have sat here, where it has been shewn that the party had a right to expect that the money had been or would be duly paid, but, contrary to good faith and to his just expectations, the promise he relied on was broken, we have considered that to be an emergency entitling him to indulgence." Here, the applicant had a debt justly due to him from his brother, and he entered into the articles in reliance upon the promise of his debtor to pay him the debt in time to enable him to comply with the requirements of the statute. If the disappointment of a just expectation of that sort is not an "unforeseen emergency," it is difficult to conceive what is.

LORD COLERIDGE, C.J. This is an application by an articled clerk to allow the inrolment of his articles nunc pro tunc, and his service thereunder to reckon from the date of their execution, notwithstanding his failure to pay the stamp-duty thereon within the six months limited by statute. There are, no doubt, many cases in which the Courts have allowed such applications to prevail: and such is the variety of events that it is almost impossible to find one case like another in all its circumstances. The principle which I deduce from all of them is that which is well expressed in *Ex parte Breden* (1) and *Ex parte Darville.* (2) In the former of those cases, Erle, C.J., says (3): "In this case, the applicant, in the Queen's Bench, accounted for the omission because he relied on a promise that the money would be paid for him, and had gone on with the service in the hope that the promise would be performed. As a general rule, this could not be accepted as sufficient. But the further affidavits shew that the applicant has been deprived of the money which was fairly his right, by an emergency which we may most justly infer was entirely unforeseen by him. He had been the managing clerk for an attorney who died leaving a widow, and a young son who could not take up the business and carry it on. He gave his services to them and their friend to keep that business together, and has succeeded in doing so. The son, as soon as he was admitted an attorney, gave him his articles; and the widow promised to pay the stamp-duty: and so he became

(1) 12 C. B. (N.S.) 351; 31 L. J. (C.P.) 321.

(2) Law Rep. 2 C. P. 244.

(3) 12 C. B. (N.S.) at p. 363.

bound to the son. He had thus been obliged to continue in the service: and he states that he was in constant belief that the widow would perform her promise. When that belief failed, he obtained the money for himself near two years before the term of service expired, and satisfied the claim of the treasury, and now makes this application. Some of these facts were not before the judges of the Court of Queen's Bench. We have conferred with them since, and, under the circumstances above stated, that Court concurs with us, and we now grant the application." And in *Ex parte Darville* (1), Bovill, C.J., says: "The affidavit of Mr. Darville satisfies my mind that there was a bonâ fide intention on his part when he entered into the articles with Mr. Barker that the stamp-duty should be paid within the proper period; and that that intention was frustrated by circumstances which he could not at the time foresee or control." In *Ex parte Sayer* (2), in the Queen's Bench, Blackburn, J., says: "There is no case which goes the length of deciding that a just expectation of being able to obtain the money in time affords sufficient grounds for granting an application of this nature. The relief here asked for has been granted in cases where labour has honestly been thrown away; and this is the ground on which the decision in *Ex parte Breden* (3) proceeded. *Ex parte Blades* (4) carries the principle to its utmost extreme, further, indeed, than I should like to go." The promise in *Ex parte Breden* (3) was, to pay the specific thing at a particular time; and the circumstances which interposed between the making and the performance of the promise were entirely unforeseen. I cannot see that the circumstances of this case bring it within the principle I refer to. In *Sayer's Case* (5) in this Court, we acted upon a different state of facts from those which were before the Court of Queen's Bench. The applicant was defeated in his just expectation: he would have recovered the money in time, but for the obstacles thrown in the way by his debtor. I fail to see anything of the kind here. The applicant's brother owed him a sum of money, which he hoped and expected would be paid. But I

(1) Law Rep. 2 C. P. at p. 246.

(2) 32 L. T. (N.S.) 560.

(3) 12 C. B. (N.S.) 350; 31 L. J. (C.P.) 321.

(4) 44 L. J. (C.P.) 115.

(5) Ante, p. 569.

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cannot see that he had such a reasonable expectation of getting the money in time as will bring the case within the principle enunciated by Erle, C.J. Therefore the order prayed must be refused.

With regard to *Ex parte Breden* (1), I desire to say that, seeing that the Lord Chief Justice at the close of the argument intimated that he would speak to the other judges before the application was disposed of, and that, after time taken to consider, he said he had conferred with the judges of the Court of Queen's Bench, and that they concurred in that judgment, I cannot for a moment doubt the accuracy of the report, spite of the doubts which have been cast upon it.

GROVE, J. I am of the same opinion. Not only must there be an expectation of obtaining the money at the proper time, but it must be shewn that the party had reasonable grounds for that expectation. Now, I do not find upon these affidavits that this gentleman had such fair and reasonable grounds for expecting to obtain the money in time as to bring him within the rule laid down by Erle, C.J., and the rest of the Court, in *Ex parte Breden.* (1)

ARCHIBALD, J. I am of the same opinion. The circumstances of this case fall very short of those in any of the cases where the indulgence here asked has been granted. It is not enough that the party hopes or expects he may be able to borrow the money by the time it will be wanted: and the facts deposed to here do not amount to much more. There is no statement that the brother was ever able to pay the money or that the applicant had reasonable expectation that he ever would be able. The statement of the attempts to obtain the money from other sources amounts to nothing.

Rule refused.

Morten renewed the application, upon a further affidavit made by the wife of William B. Banyard, confirmatory of the statements in the affidavits of the applicant as to the existence of the debt, the

(1) 12 C. B. (N.S.) 350; 31 L. J. (C.P.) 321.

promise to pay, and the departure of her husband to New York, and concluding with an averment that she believed her husband's position at the time he so made the promise to his brother was such as to give him a belief and a just expectation of the same being fulfilled, and that the reason of such non-fulfilment arose purely out of unexpected reverses in his business.

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But the Court adhered to its former decision.

Attorneys for applicant: *Mardon & Morten.*

ENGELBACK *v.* NIXON.

June 18.

Interpleader Issue—Equitable Claim—Bankrupt contracting new Debts whilst trading with Consent of Trustee—32 & 33 *Vict. c.* 71, *s.* 26.

Upon an interpleader issue, the Court will take notice of equitable rights,—Denman, J., doubting.

Duncan v. *Cashin* (Ante, p. 554), followed.

In 1870, E. was adjudicated a bankrupt, and was allowed by the trustee to carry on his business for the benefit of his creditors. In 1875, a creditor, whose debt had been contracted whilst, and who was ignorant of the circumstances under which, E. was so trading, obtained a judgment against him, under which the sheriff seized in execution furniture which E. had acquired by means of the profits of such trading. Upon an interpleader issue, in which the trustee was plaintiff and the execution-creditor defendant:—

Held, upon the authority of *Troughton* v. *Gitley* (Amb. 629), that, as a Court of equity would, under the circumstances, decree the goods to be the goods of the execution-creditor, the same result must follow upon an interpleader issue in a Court of law.

INTERPLEADER issue to try whether certain goods seized in execution by the sheriff of Kent on the 18th of January, 1875, under a writ of fi. fa. on a judgment in the Court of Common Pleas recovered by the defendant, Nixon, were at the time of the seizure the property of the plaintiff as against the defendant.

The issue was tried before Cockburn, C.J., at the last Spring assizes at Maidstone. The facts were as follows:—One Edwards, who carried on the business of an advertising agent in Thames Street, London, was in 1870 adjudicated a bankrupt. It appeared from the proceedings that his debts amounted to 14,717*l.*, of which 9000*l.* was secured, the rest unsecured; that his stock-in-trade

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was valued at 25*l.*, his book-debts (nominally 2920*l.*) at 450*l.*, and his household furniture and effects (which were claimed by the landlord for rent) at 30*l.*; and that no dividend had been paid; nor had Edwards obtained his discharge under the Act. The trustee first appointed having retired, the plaintiff was duly appointed trustee in his place in the year 1873.

After his bankruptcy, Edwards, with the consent of the trustee, continued to carry on business as before, at first in Thames Street, and afterwards in Bishopsgate Street, the bankruptcy, in the language of a witness for the plaintiff, being "left open, to give the bankrupt an opportunity of trading to pay his old creditors." No accounts of the profits of the trade were ever given to the trustee; but inquiries upon the subject were said to have been made at the bankrupt's office. It was admitted that, though there were at first some profits, the business had latterly been carried on at a loss.

The trustee, finding that there were judgments against Edwards at the suit of new creditors, and that he possessed furniture and effects (acquired by him since the bankruptcy) at a place called Wigan Hall House, Sevenoaks, on the 14th of January, 1875, obtained from him the key, and placed a man in possession there. The sheriff of Kent entered on the 18th under a fi. fa. at the suit of the defendant, and seized the furniture, whereupon the plaintiff, as trustee, claimed it; and the sheriff took out an interpleader summons.

The defendant had no notice that Edwards had been bankrupt.

The Lord Chief Justice directed a verdict for the plaintiff, subject to leave reserved to the defendant to move to enter a verdict for him, on the grounds,—1. that, upon the facts proved at the trial, the plaintiff did not become the owner of the goods seized by the sheriff.—2. that, if he did become such owner, he was precluded from asserting his right to the goods as against the defendant,—3. that the defendant was beneficially entitled to the goods as against the plaintiff. The Court to draw inferences of fact.

Willis, in Easter Term last, obtained a rule nisi accordingly.

W. A. Lewis shewed cause. The contention on the part of the defendant rests upon the doctrine supposed to have been estab-

lished by the case of *Troughton* v. *Gitley* (1), that, if an uncertificated bankrupt trade, with the permission of the assignees, and contract new debts, an equity arises by which subsequent creditors acquire a preference with respect to the after-acquired effects. That, however, was an administration suit, and the case was decided upon its specific facts, and by one who was a judge of the facts, and who drew an inference that the bankrupt was allowed by his creditors to trade for his own benefit. Here, however, the trade was to be carried on for the benefit of the creditors. The judgment of Lord Camden is to this effect,—"This is the case of a man who has demeaned himself to the satisfaction of his creditors, and under such behaviour suffered to trade for four years without interruption or claim. I believe it was the intention of the creditors that he should trade for his own benefit. . . . The creditors knew that the bankrupt continued to trade, and that he was trading with a multitude of persons; and, in order to do that, it was necessary he should take as well as give credit. This is a declaration to all mankind that he had sufficient capacity. It falls within the principle that, if a man having a lien stands by and lets another make a new security, he shall be postponed,—the common case of first mortgagee suffering a second mortgage, without giving notice of his security. Therefore I think that the creditors under the commission ought to lose their priority." That case has been much doubted, and virtually overruled. In *Ex parte Brown* (2), Lord Loughborough, speaking of it, says: "The case before Lord Camden was upon the laches of the first creditors, and the false credit which they gave." In *Everett* v. *Backhouse* (3), it was held that an uncertificated bankrupt in general can acquire property only for the creditors: and Sir W. Grant, M.R., speaks of *Troughton* v. *Gitley* (1) as a decision on the particular circumstances. *Ex parte Martin* (4) expressly overrules it. "With respect to *Troughton* v. *Gitley*" (1), says Lord Eldon (5), "very great difficulties occur upon that case; and, though it was the decision of Lord Camden, it has never been considered as of very high authority." In *Ex parte Crew* (6) his lordship again speaks

(1) Amb. 629.
(2) 2 Ves. Jun. 66, 68.
(3) 10 Ves. 94.
(4) 15 Ves. 114.
(5) 15 Ves. at p. 116.
(6) 16 Ves. 236, 238.

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of *Troughton* v. *Gitley* (1) as being "attended with sufficient difficulty." *Ex parte Lees* (2), at first sight, would seem to be opposed to this view. There was, however, plain collusion there. *Tucker* v. *Hernaman* (3) was a decision which rested upon its own special circumstances. *Troughton* v. *Gitley* (1) and *Everett* v. *Backhouse* (4) were cited there: but the other cases above referred to were not cited. *Cole* v. *Coles* (5) is a particularly strong authority in favour of the plaintiff. It was there held that the omission of the assignees of an insolvent debtor to sell or take possession of the copyhold estate of the insolvent, or to cause an entry of the assignment or copy of the appointment of the assignee to be made on the court rolls, or to possess themselves of the copies of court roll for a period of nineteen years after the insolvency, whereby the insolvent was enabled to retain the property and hold himself out as the owner, and mortgage it for value to a person who had no actual knowledge of the insolvency, did not constitute an equitable ground for giving such mortgagee a charge in priority to the title of the assignee. In giving judgment, Sir James Wigram, V.C., says (6): "I cannot say there has been that gross negligence on the part of the assignee as should induce a Court of equity to interpose on behalf of a mortgagee to postpone the creditors of the insolvent."

[BRETT, J. But the judgment clearly recognizes the principle upon which *Troughton* v. *Gitley* (1) was decided. Lord Justice Turner says (7): "Mr. Rolt, on behalf of the official assignee, has said that the circumstances of this case are different from those in the case of *Troughton* v. *Gitley*. (1) The circumstances of one case must, to a certain extent, necessarily differ from those of another; but the Court is to look to the principle laid down in that case by Lord Camden in these very distinct terms: 'It falls within the principle that, if a man having a lien stands by and lets another make a new security, he shall be postponed.' Therefore, the result in this case is, that it must be considered as coming within the principle of *Troughton* v. *Gitley*." (1)]

(1) Amb. 629.
(2) 16 Ves. 472.
(3) 1 S. & G. 394; 22 L. J. (Ch.) 487; on appeal, 4 D. M. & G. 395; 22 L. J. (Ch.) 791.
(4) 10 Ves. 94.
(5) 6 Hare, 517.
(6) 6 Hare, at p. 523.
(7) 22 L. J. (Ch.) at p. 792.

17 Jur. 457, 723 17 Jur. 714

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The 26th section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), enacts that "the trustee may appoint the bankrupt himself to superintend the management of the property or any part thereof, or to carry on the trade of the bankrupt (if any) for the benefit of the creditors, and in any other respect to aid in administering the property in such manner and on such terms as the creditors direct." No formal appointment is necessary.

Willis, in support of the rule. The bankrupt was permitted to trade from 1870 till 1875 without any examination or inquiry as to what he was doing, except that an attorney's clerk called probably once at his office; and when the defendant's debt was contracted he appeared to be carrying on a different business and at a different place for his own benefit. The 26th section of the Bankruptcy Act, 1869, contemplates the carrying on the trade which has become the trade of the assignee or of the creditors, as in *Cox* v. *Hickman*. (1) That section is in substantially the same terms as s. 35 of 1 & 2 Vict. c. 56. Notwithstanding the remarks of Lord Eldon in *Ex parte Martin* (2), the doctrine of Lord Camden in *Troughton* v. *Gitley* (3) has never been impeached. Lord Eldon at that time entertained the notion that there could not be two commissions existing at the same time. But that has long since been exploded: *Morgan* v. *Knight*. (4) In *Ex parte Bourne* (5), Lord Eldon himself says: "Take the instance of a commission taken out in 1820, and another taken out against the same person four or five years afterwards upon a subsequent trading; according to the strict law, the creditors taking out the commission in 1820 would have a right to all the subsequently-acquired property, until he should have obtained his certificate under such first commission; but, if he has been permitted to go into the world as a trader, and to gain credit as such, whatever a Court of law might say about the rights of the creditors under the first commission, this Court has said it would support the second commission to this extent,—that it would not permit the creditors

(1) 3 C. B. (N.S.) 523; 27 L. J. (C.P.) 129; 8 H. L. C. 268.
(2) 15 Ves. 114, 116.
(3) Amb. 629.
(4) 15 C. B. (N.S.) 669; 33 L. J. (C.P.) 168.
(5) 2 Gl. & J. 137, 141.

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under the first commission to take that which they could not take without injustice to the creditors under the second, whom they have permitted to deal with the bankrupt as if he had his certificate; and that they should only take that part of the bankrupt's subsequently-acquired property which should remain after all the creditors who had been so permitted to deal with him after the first commission should have been paid; that the profits derived by the bankrupt from such subsequent dealings shall belong to the creditors under the first commission, but the debts contracted in his trading after he secondly engaged in trade with the permission of those creditors shall be first paid." That is a direct affirmance of the doctrine of *Troughton* v. *Gitley*. (1) Upon the same principle, in *Ex parte Butler, re Bakewell* (2), it was held that, where an assignee under a second commission, under which the bankrupt obtained his certificate, but did not pay 15*s*. in the pound, lay by while the bankrupt was subsequently trading to a great extent for a period of eight years without making any claim to his subsequently-acquired property, and the party then became bankrupt a third time,—the assignees under the third bankruptcy, and not the assignees under the second commission, had, on principles of equity, the preferable claim to the property thus subsequently acquired. Sir John Cross, in giving judgment, says (3): "It is very true that Lord Eldon has said, in *Ex parte Martin* (4) and in *Ex parte Storks* (5), that the case of *Troughton* v. *Gitley* (1) was not of very high authority; but the decision of Lord Camden in that case has never been overruled; and, in *Ex parte Brown* (6), Lord Loughborough explains the principle upon which the decision in that case was founded, saying, 'the case before Lord Camden was upon the laches of the first creditors and the false credit which they gave.'" In *Butler* v. *Hobson* (7), it was held that goods allowed to be in the order and disposition of a bankrupt as reputed owner, by the consent of his assignee, are liable to be seized, upon a subsequent insolvency, by the assignee of the Insolvent Debtors Court. Tindal, C.J., in giving judgment, said (8):

(1) Amb. 629.
(2) 2 M. D. & D. 731.
(3) 2 M. D. & D. at p. 741.
(4) 15 Ves. 114.
(5) 3 V. & B. 106; 2 Rose, 179.
(6) 2 Ves. Jun. at p. 68.
(7) 4 Bing. N. C. 290.
(8) 4 Bing. N. C. at p. 298.

"It appears that, from the date of the second commission in 1828, down to the time of the fiat in 1836, the bankrupt has been allowed to carry on trade to a very large extent with the consent of the assignees under the second commission. But for such consent, they might have seized at any time after-acquired property, and have divided it among the creditors under that commission: the bankrupt, therefore, could have had the ordering and disposition of it only by the consent of the assignees. The question, therefore, is whether any distinction can be drawn between a consent given by an assignee for creditors and a consent given by any other owner. I think that, on principle, and on the language of the statute (1), no such distinction can be taken. The case of an assignee for creditors is not distinguishable from the case of a trustee; and if a trustee clothed with the character of legal proprietor permitting a trader to have the order and disposition of goods is liable to be deprived of those goods upon the trader's becoming bankrupt, why should an assignee for creditors be exempted from the same consequences? The injury to others is the same, and is occasioned by the same appearances and the same conduct on the part of the person legally entitled to the property."

[DENMAN, J. Is that consistent with *Nias* v. *Adamson* (2)? There, the assignees of an uncertificated bankrupt, by agreement, for a valuable consideration paid to them by a third person, had left the bankrupt's furniture in his possession, and afterwards, notwithstanding such agreement, seized it; and it was held that they were justified in so doing,—an uncertificated bankrupt not being entitled to retain any property as against his assignees.]

There the assignees had not by their conduct permitted any equities of a third party to intervene. It was a mere question between the bankrupt and his assignees. Lord Justice Turner, in the case of *Tucker* v. *Hernaman* (3), distinctly recognizes the authority of *Troughton* v. *Gitley*. (4)

But for the doubt intimated by Mr. Justice Denman in the recent case of *Duncan* v. *Cashin* (5), it might be said to have been

(1) 6 Geo. 4, c. 16, s. 72.
(2) 3 B. & Ald. 225.
(3) 4 D. M. & G. 395, 400; 22 L. J. (Ch.) 791.
(4) Amb. 629.
(5) Ante, p. 554.

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firmly settled that the Court will upon an interpleader issue consider the equitable rights of the parties: *Roach* v. *Wright* (1); *Shingler* v. *Holt* (2); *Rusden* v. *Pope* (3); *Bank of Ireland* v. *Perry*. (4)

[DENMAN, J. I rested my judgment in *Duncan* v. *Cashin* (5) upon the ground of what I understood to be the agreement of the parties at Chambers, that the judge should deal with the equities.]

The object of an interpleader issue is to inform the mind of the Court as to who is entitled to the beneficial ownership of the goods.

BRETT, J. This case has been very fully and very ably argued on both sides. I have come to the conclusion that the rule to enter a verdict for the defendant should be made absolute. The dispute arises upon an interpleader issue between the plaintiff as trustee of one Edwards, a bankrupt, and the defendant, a creditor of Edwards, who had obtained judgment and execution against his goods. It was reserved for the Court to draw inferences; and the inference I draw from the facts reported to us is as follows:—Edwards, who carried on the business of an advertising agent, was adjudicated a bankrupt in 1870. The plaintiff was duly appointed trustee; and, in order to obtain something for the creditors, he allowed Edwards (who never obtained a discharge under the Act) to remain in the office and carry on his business as before. At first the business was remunerative, but latterly it had been carried on at a loss. Whilst Edwards so carried on his trade, he contracted a debt with Nixon, who had no notice of the bankruptcy; and Nixon obtained a judgment against him in this Court, under which the sheriff of Kent, on the 18th of January, 1875, seized certain furniture at the residence of Edwards at Sevenoaks, which on sale realized 136*l*. The furniture so seized had been acquired by Edwards by means of his trading in the manner before mentioned. Under these circumstances, I entertain but little doubt that at law the furniture in question belonged to the plaintiff as trustee. But we are called upon to decide the rights of the parties under an interpleader issue obtained at the instance of the sheriff, in which case other than legal considerations

(1) 8 M. & W. 155.
(2) 7 H. & N. 65; 30 L. J. (Ex.) 322.
(3) Law Rep. 3 Ex. 269.
(4) Law Rep. 7 Ex. 14.
(5) Ante, p. 554.

arise. It seems to me that the facts proved bring this case precisely within *Troughton* v. *Gitley*. (1) It was suggested by the learned counsel for the plaintiff that that case had been overruled or was wrongly decided; and expressions of Lord Eldon in subsequent cases were referred to intimating his disapproval of it,—amongst others, *Ex parte Martin*. (2) Be that as it may, Mr. Willis has satisfied us that no Court of equity has overruled *Troughton* v. *Gitley* (1), but that, on the contrary, it has repeatedly been affirmed. Lord Eldon himself, in *Ex parte Bourne* (3), seems to have accepted the doctrine of *Troughton* v. *Gitley* (1) as an equitable doctrine then in force. So, in *Ex parte Butler* (4), Sir John Cross, sitting in the Court of Bankruptcy, affirmed the doctrine of *Troughton* v. *Gitley*. (1) And, further, there is the exceedingly strong authority of the Lords Justices Turner and Knight Bruce in *Tucker* v. *Hernaman* (5), in favour of *Troughton* v. *Gitley* (1), as an existing equitable doctrine. Inasmuch, therefore, as I think the present case falls within the principle there enunciated, it follows that, as a Court of equity would decree that the furniture in question belongs to the defendant rather than to the plaintiff, this Court must in like manner hold that the defendant has the better title. It by no means follows that, if this had been a dispute between the plaintiff and Edwards in a Court of law, the former would not have succeeded, according to *Nias* v. *Adamson*. (6) There was no interpleader there, and consequently no question arose as to equitable rights. The dispute arose between the assignee and the debtor; and, as the bankrupt in strict law could acquire no right, the Court held that the property belonged to the assignee. If, therefore, this had been an action by the plaintiff against Edwards, we must have held that this furniture belonged to the assignee. But the dispute here arising between the trustee in bankruptcy and an execution-creditor, and as a Court of equity, as I have already observed, would have decided in favour of the defendant, must we not in like manner hold that he has the better title to the goods?

(1) Amb. 629.
(2) 15 Ves. 115.
(3) 2 Gl. & J. 137, at p. 141.
(4) 2 M. D. & D. 731, 741.
(5) 4 D. M. & G. 395; 22 L. J. (Ch.) 791.
(6) 3 B. & Ald. 225.

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That depends upon the question whether, upon an interpleader issue, we are entitled to take notice of equitable rights or claims, and to say that this plaintiff, as against this defendant, has no right to the furniture seized. The power of a Court of law to entertain equitable claims seems to me, for the reasons which I gave in the recent case of *Duncan* v. *Cashin* (1), to be now settled. Although my Brother Bramwell doubted it in *Rusden* v. *Pope* (2), the rest of the Court came to the conclusion that it was competent to them to do so. The statement in the head-note to that case is this,—"Upon an interpleader issue the Court will consider the equitable rights of the parties;" and that seems to me to be a correct statement of the point decided. There, the action was brought by the mortgagees of a ship against persons to whom she had been chartered by them after the mortgage. The charterers interpleaded, and an issue was directed between the plaintiffs and the trustee in bankruptcy of the mortgagors; and, upon a case stated between the parties, the question was whether the plaintiffs were entitled to the freight as against the claimant, the trustee: the Court held that, inasmuch as the plaintiffs were equitably entitled to the freight as against the owners, and the trustee could only claim that to which the bankrupts were equitably as well as legally entitled, the plaintiffs were entitled to recover. But there was a further authority decided by the same Court, viz. *Bank of Ireland* v. *Perry*. (3) There a special case was stated upon an interpleader issue in an action by the defendant against merchants in London, to recover the balance of the price of a cargo of grain sold by him to them, which sum the plaintiffs claimed to have applied in discharge of a bill drawn upon and accepted by the defendant, and discounted by them. The Court held that the plaintiffs were equitably entitled to have a certain sum in the hands of the London merchants applied pro tanto in discharge of the bill so discounted by them. In giving judgment, Cleasby, B., says: The case has been presented to us sitting in a Court of equity, and we are asked to say that in equity the plaintiffs have a right to the money in dispute. Whether they have or not depends

(1) Ante, p. 554. (2) Law Rep. 3 Ex. 269.
(3) Law Rep. 7 Ex. 14.

mainly on *Ex parte Waring* (1), and the cases which have followed that decision." In *Duncan* v. *Cashin* (2), although my Brother Denman doubted, my Brother Huddleston concurred with me in following the decision in the two cases in the Exchequer, and I think that decision must now be considered a binding authority in this Court, that, upon an interpleader issue, the Court will entertain equitable claims. I therefore think this rule should be made absolute.

GROVE, J. I am of the same opinion, and I have very little to add. The case of *Troughton* v. *Gitley* (3), so far from being overruled, appears to have been recognized on several occasions as laying down a sound rule of equity. It certainly was adversely observed upon by Lord Eldon in *Ex parte Martin* (4) and in one other case. (5) But, in *Ex parte Bourne* (6), his Lordship acted upon the principles upon which *Troughton* v. *Gitley* (3) is founded, and which I take to be this, that, where a bankrupt trades without the knowledge of his assignees or trustee, any property which he may acquire by so trading will pass to the creditors under the bankruptcy; but that, if the assignees or trustee permit him to trade, and knowingly allow him to treat with new creditors who, in ignorance of his circumstances, deal with him upon the faith of his ability to contract,—especially where he has changed his trade or the place of carrying it on,—the new creditors have a right to be paid out of the newly-acquired assets before the creditors under the first bankruptcy. The only doubt that could arise is occasioned by s. 26 of the Bankruptcy Act, 1869, which provides that "the trustee may appoint the bankrupt himself to superintend the management of the property or any part thereof, or to carry on the trade of the bankrupt (if any) for the benefit of the creditors, and in any other respect to aid in administering the property, in such manner and on such terms as the creditors direct." But that section, as Mr. Willis pointed out, applies only to the case of an arrangement between the trustee and the bankrupt that the latter may continue to carry on the

(1) 19 Ves. 345.
(2) Ante, p. 554.
(3) Amb. 629.
(4) 15 Ves. 114.
(5) *Ex parte Crew*, 16 Ves. 236.
(6) 2 Gl. & J. 137.

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trade as agent of the former and for the benefit of the creditors, and not to a case where the trade is carried on under a secret arrangement between the trustee and the bankrupt, whereby the bankrupt is enabled to enter into fresh engagements and incur liabilities to third persons without notice of his actual condition, or where the trustee has by his laches in lying by induced third persons to deal with the bankrupt as if no bankruptcy had occurred. I see no distinction between *Troughton* v. *Gitley* (1) and the present case which could in any way operate to the prejudice of the subsequent creditors. For the reasons given by Tindal, C.J., in *Butler* v. *Hobson* (2), it is the same whether the bankrupt be allowed to continue the trade for his own benefit or for the benefit of his former creditors. *Troughton* v. *Gitley* (1) was recognized by Lord Eldon himself in *Ex parte Bourne* (3), and was followed by the Lords Justices in *Tucker* v. *Hernaman* (4), and therefore must be considered as laying down the true principle upon which a Court of equity would act under such circumstances as these.

As to whether or not it is competent to a Court of law to take notice of equitable considerations upon an interpleader issue, I understand the doctrine to have been fully accepted and acted upon at Chambers. I do not say that it will apply in all cases, because there may be some in which, for want of the proper machinery, a Court of law would be unable to apply it to the fullest extent.

DENMAN, J. The question here arises as between the trustee of an uncertificated (or undischarged) bankrupt and an execution creditor who has seized furniture acquired by the bankrupt after his bankruptcy upon premises in which the bankrupt resided, and which furniture had not been taken possession of by the trustee until after execution issued. After the full discussion the case has undergone, I come to the same conclusion that the rest of the Court have come to as to how a Court of equity would decide between these two parties. I think the case of *Troughton* v. *Gitley* (1) is a binding authority in equity. Although occasionally

(1) Amb. 629.
(2) 4 Bing N. C. 290, 299.
(3) 2 Gl. & J. 137.
(4) 4 D. M. & G. 395; 22 L. J. (Ch.) 791.

observed upon, it has repeatedly been recognized from a very early period down to very lately; and, according to that case, as between these parties, the defendant would be held to have the better right. That being so, we are fully justified in saying that in equity the plaintiff has not a right to the goods in question as against the defendant. Each has a right as against the bankrupt. According to *Nias* v. *Adamson* (1), as between the trustee and the bankrupt, the former would in law be entitled to the goods. He has a duty to perform; and he had possession of the goods when the sheriff went in. On the other hand, the defendant has a right of a high kind under his execution. And we come to the conclusion that equity would decree the prior right to be in the defendant. The difficulty is as to how far a Court of law may upon an issue of this kind take notice of equitable rights. We have not been very accurately informed as to what is the machinery which a Court of equity would bring to bear upon a case of this kind. And I must confess I entertain considerable doubt, although I do not see my way so clearly as to say that I feel confident we are not doing justice. The doubts I ventured to intimate in the recent case of *Duncan* v. *Cashin* (2) are not wholly removed. In that case, as well as in the two cases in the Exchequer, there was something like an agreement between the parties to submit themselves to the equitable jurisdiction of the Court; and it was upon that ground that my judgment proceeded. I do not quite see how, sitting in a Court of law, we are to do full justice to all the parties as a Court of equity or a Court of bankruptcy might do. But I feel that I ought to accept the decision in *Duncan* v. *Cashin* (2) as the judgment of the Court; and though, if the matter were res integra, I might have considered myself free to discuss it, I see no reason why we should not decide this question upon equitable grounds. I therefore agree with the rest of the Court, though not without some doubt and hesitation.

Rule absolute.

Attorneys for plaintiff: *Gover & Norton.*
Attorneys for defendant: *Reep, Lane, & Co.*

(1) 3 B. & A. 225.

(2) Ante, p. 554.

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June 22.

GWINNELL *v.* EAMER AND WIFE.

Nuisance—Leaving an insecure Grating in a public Foot-path—Landlord and Tenant.

A. was injured by the giving way of a grating in a public foot-way, which was used for a coal-shoot and for letting light into the lower part of premises adjoining. These premises were at the time of the accident under lease to B., who covenanted to repair and keep in repair all except the roofs, main walls, and main timbers. At the time of the demise the grating was unsafe; but there was no evidence that C., the landlady, had any knowledge of its unsafe state; and the jury found that no blame was attributable to her for not knowing it:—

Held, upon the authority of *Pretty* v. *Bickmore* (Law Rep. 8 C. P. 401), that no action was maintainable against C.

At the time of the accident, A. was not passing along the way, but was standing on the grating to talk with a person at a window above it:—

Held, that A. was not making an improper use of the grating.

THIS was an action to recover damages for an injury sustained by the plaintiff in consequence of the giving way of a grating in the foot-pavement adjoining premises No. 8, St. George's Square, Cheltenham, of which the female defendant was the owner.

The declaration was in the common form. Pleas, not guilty, not possessed, denial of liability, and that the plaintiff was not lawfully using the way. Issue thereon.

The cause was tried before Quain, J., at the last Spring assizes at Gloucester. The facts were as follows:—On the 16th of August, 1874, the plaintiff, wishing to see a Mr. Hodges, who lodged at the house No. 8, St. George's Square, and finding the window open, went up to it and stood upon an iron grating which was flush with the foot-path, serving the double purpose of a coal-shoot and an access of light to the kitchen below. This grating had been placed there about thirty years ago, and there was no suggestion that any repair had been done to it since. Whilst the plaintiff stood there, a bar of the grating, weakened by time and rust, gave way, and his leg slipped through and was injured. At the time of the accident, the house was in the occupation of a tenant who held under an agreement dated the 24th of July, 1873, containing a covenant on the tenant's part to repair and keep the premises in tenantable repair and condition, except the

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roofs, main walls, and main timbers, which were to be kept in repair by the lessor.

The tenant swore that the grating was in no worse state at the time of the accident than it was in at the commencement of his tenancy, at Michaelmas, 1873: and a witness who had assisted at the original fixing of the grating expressed an opinion that it was not in a safe condition at Michaelmas, 1873.

It was objected for the defendants, that, under the circumstances, the tenant was the person liable, and not the landlord, and that the plaintiff was not properly using the way at the time of the accident.

For the plaintiff reliance was placed upon *Gandy* v. *Jubber*. (1)

In answer to questions put to them by the learned judge, the jury said: "We consider this grating was in an unsafe condition when the house was let, at Michaelmas, 1873. We consider the plaintiff was not making any improper use of the place when the accident occurred." And they assessed the damages at 50*l*.

The learned judge nonsuited the plaintiff, on the ground that there was no evidence that Mrs. Eamer had any knowledge of the unsafe state of the grating when the house was let.

At the request of the plaintiff's counsel, a third question was put to the jury, viz. whether the insecurity of the grating was such that Mrs. Eamer, with reasonable care and diligence, ought to have discovered it when she let the house.

The jury answered, "She is not to blame for not knowing it."

H. Matthews, Q.C., in Easter Term last, obtained a rule nisi to enter a verdict for the plaintiff for 50*l*., pursuant to leave reserved, or for a new trial on the grounds of misdirection and that the finding on the third question was against the weight of evidence.

Powell, Q.C., and *Jelf*, shewed cause. The finding of the jury exonerates the defendant from all blame; and the evidence abundantly warranted it.

[BRETT, J. Assuming that the grating was unsafe at the time of the letting, but without the knowledge of the landlord, and without blame to him for not knowing it, and the tenant is under

(1) 5 B. & S. 78; 33 L. J. (Q.B.) 151. 10 Jur. N.S. 652

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covenant to repair and keep the premises in repair,—is the landlord liable?]

Clearly not. It may be conceded that the owner may be liable to an action for an injury of this sort, if he lets the premises with knowledge that the nuisance is existing at the time, and makes no provision for its removal. But, where the landlord has taken care to provide that the burthen of repairing shall be borne by the tenant, he casts off all responsibility from himself. This is distinctly laid down in the recent case of *Pretty* v. *Bickmore*. (1)

In *Gandy* v. *Jubber* (2) the occupier of the premises was not under covenant to repair.

Sawyer (*H. Matthews, Q.C.*, with him), in support of the rule. In *Pretty* v. *Bickmore* (1) the tenant knew of the defective condition of the coal-plate; and the Chief Justice relies upon that circumstance.

[BRETT, J. That is not the ground on which the judge who tried the cause puts the decision.]

Before that case, the rule was understood to be clear that, if a landlord lets premises with a dangerous nuisance upon them, he is liable for the consequences: *Rosewell* v. *Prior* (3); *Rex* v. *Pedly* (4); *Thompson* v. *Gibson*. (5) In the course of the argument in the Court of Error in *Gandy* v. *Jubber* (6), Mr. Mellish said: "There can be no doubt that whoever demises premises with a nuisance upon them is liable for mischief occasioned thereby." To this argument, Erle, C.J., assents; for he says (7): "A landlord may be responsible if there is a duty on him to abate a nuisance which he does not. *If he lets the premises with a nuisance, all parties agree that he is responsible.*" And see the undelivered judgment in that case, reported in 9 B. & S. 15.

[DENMAN, J., referred to *Cheetham* v. *Hampson* (8), *Payne* v. *Rogers* (9), and *Russell* v. *Shenton*. (10)]

The defendant, having let the premises with a dangerous

(1) Law Rep. 8 C. P. 401.
(2) 5 B. & S. 78; 33 L. J. (Q.B.) 151. 10 Jur. N.S. 652.
(3) 2 Salk. 460; 12 Mod. 639.
(4) 1 Ad. & E. 822.
(5) 7 M. & W. 456.
(6) 5 B. & S. at p. 486.
(7) 5 B. & S. at p. 492.
(8) 4 T. R. 318.
(9) 2 H. Bl. 349.
(10) 3 Q. B. 449.

nuisance upon them, ought not to be permitted to get rid of her liability for the consequences merely by casting the duty of future repairs upon a third person, whether a responsible person or not. At all events, the verdict was against the weight of evidence upon the third question put to the jury.

BRETT, J. This was an action against the defendant as the owner of premises in Cheltenham for an accident which happened to the plaintiff after a demise to a tenant. At the time of the demise, a grating which formed an appurtenant to the premises, and which was placed in the foot-pavement in front of the house, was out of order so as to be a nuisance. The owner at the time had no knowledge of the defective state of the grating, and had no means of knowing it, and was guilty of no negligence in being ignorant of it. By the terms of the demise the tenant bound himself to repair and keep in repair all except the roofs, main walls, and main timbers of the house. Under this state of facts, *Pretty* v. *Bickmore* (1) is in point in every particular. The Court there held that, where premises are demised, and there is no longer any obligation on the landlord to keep them in repair, but that duty is by the contract cast upon the tenant, a person who is injured by any want of repair of them has no remedy against the landlord. We must act upon that case. And I must go further, and say that I have heard no argument to shew that *Pretty* v. *Bickmore* (1) was not rightly decided. If the landlord at the time of the demise knows of the defect, and does nothing to cause it to be remedied, he may be liable too. But I doubt very much whether, if the burthen of repair is cast upon the tenant, the duty of the landlord does not altogether cease. Here the accident occurred after the demise. If, therefore, the plaintiff has any remedy at all, it must be against the tenant, and not against the landlord.

DENMAN, J. I am of the same opinion. *Pretty* v. *Bickmore* (1) is an authority expressly in point; and I see no reason to doubt that it was correctly decided. The case was fully argued. *Rex* v. *Pedly* (2) was cited, and the rule was refused. The liability of the party was put upon the true ground. To render the owner

(1) Law Rep. 8 C. P. 401. (2) 1 Ad. & E. 822.

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liable, circumstances must be shewn such as are mentioned at the close of the judgment in *Todd* v. *Flight*. (1)

LINDLEY, J. I am of the same opinion. *Pretty* v. *Bickmore* (2) is, I think, right in all respects. There might be some question as to *Gandy* v. *Jubber* (3), which, however, rather supports than conflicts with *Pretty* v. *Bickmore*. (2)

Rule discharged.

Attorney for plaintiff: *T. J. Pullen.*

Attorney for defendants: *E. Doyle, for Taynton & Son, Gloucester.*

July 9.

WATKINS, APPELLANT; MAJOR, RESPONDENT.

Jurisdiction of Justices—Game—Bonâ fide Claim of Right—Mens rea—1 & 2 Wm. 4, c. 32, s. 30.

10 QB 566

It is not sufficient to oust the jurisdiction of the justices in regard to a charge of trespass in pursuit of game under 1 & 2 Wm. 4, c. 32, that there is an honest claim of right if such claim is absurd and impossible in point of law. The question is whether a reasonable claim of right is involved, and not one of mens rea, inasmuch as the statute is not a mere criminal statute, but is intended for the protection of the peculiar rights of those entitled to shoot game.

CASE stated by justices under 20 & 21 Vict. c. 43.

The facts were in substance as follows:—

An information was laid by the respondent, on behalf of the Rev. W. S. Escott, against the appellant under s. 30 of 1 & 2 Wm. 4, c. 32, for a trespass in pursuit of game upon certain land called "Alms Hill," part of Alcombe Common, within the manor of Alcombe, then in the tenure of the said Rev. W. S. Escott as lord of the said manor. The justices convicted the appellant under the following circumstances:—It was admitted that the appellant did, on the 9th of September, 1874, shoot a rabbit on the common in the presence of one Charles Smith, a person appointed to watch for trespassers by James Hole, Esq., who held the right of shooting over the common from the said W. S. Escott. On the part of the appellant, who is a youth about thirteen years

(1) 9 C. B. (N.S.) 377; 30 L. J. (C.P.) 21. 7 Jur. N.S. 291

(2) Law Rep. 8 C. P. 401.

(3) 5 B. & S. 78; 33 L. J. (Q.B.) 151. 10 Jur. N.S. 652.

old, his father, Mr. W. T. P. Watkins, a solicitor, appeared, and contended that there was no evidence of the existence of the manor of Alcombe, or that the Rev. W. S. Escott was lord of the manor (1); and he further stated that he, the said W. T. P. Watkins, claimed rights of common and also a right of sporting there, and he produced a lease to him dated the 14th of September, 1871, from Thomas Abraham, Esq., for a long term of years of a close of land at Alcombe, adjoining or near to the common, on which close he had lately built a house, and in respect of which close he claimed as one of the commoners rights of common, and also a right of sporting and killing rabbits on Alcombe Common. The lease did not specify any such rights. He further contended that the claim of right so set up by him was bonâ fide, and was sufficient to oust the jurisdiction of the justices. No evidence was offered that any of the commoners, or any other person, except the Escott family, or persons authorized by them, had ever claimed or exercised a right of killing game or rabbits, or of sporting on the common. A correspondence was put in between Mr. Watkins and the said James Hole, Esq., and the solicitors of Mr. Escott, in which Mr. Watkins claimed a right to sport over Alcombe Common, and stated that his sons did so in support of that right. The case then stated that the justices being of opinion that for the purpose of supporting the said information there was sufficient evidence of the existence of the manor or reputed manor of Alcombe, that Alcombe Common was part of that manor, and that the said W. Escott was lord of the said manor, that there was no evidence of the existence of the right claimed by Mr. Watkins, and that his setting up such a right did not take the case out of the jurisdiction of the justices, they accordingly convicted the appellant, as before mentioned.

The questions for the Court were, first, whether the magistrates were justified in coming to the conclusion that there was sufficient evidence as aforesaid; and, secondly, whether the claim of right set up by the father of the appellant was sufficient to oust the jurisdiction of the magistrates.

Sawyer, for the appellant.

(1) The evidence as to these points is not set out, as it is immaterial to this report.

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[BRETT, J. The magistrates have not found that the claim of right was not bonâ fide.]

Charles, for the respondent, was called upon. The decisions are express that when the right is not of a nature that is possible in law, there cannot be such a claim of right as to oust the jurisdiction. A mere bonâ fide belief in the existence of a right when the nature of the claim is absolutely baseless and absurd is not sufficient: *Leatt* v. *Vine* (1); *Hudson* v. *McRae* (2); *Cornwell* v. *Saunders*. (3)

[BRETT, J. Is not the charge of trespass in pursuit of game of a criminal nature, and must there not, therefore, be a mens rea?]

The decisions are distinctly against this view. In *Hudson* v. *McRae* (2) the words of the statute were "unlawfully and wilfully," and yet it was held that no mens rea need exist. Here the right claimed is similar to that claimed in *Cornwell* v. *Saunders*. (3) The claim is of a right of shooting as a commoner: such a right is unknown to the law. [He also cited *Lovesy* v. *Stallard* (4); *Reg.* v. *Stimpson* (5); Paley on Convictions, 150.]

Sawyer, in reply. A trespass in pursuit of game is clearly an offence of a criminal nature, and so, on principle, there should be mens rea. [He cited *Reg.* v. *Cridland* (6); *Reg.* v. *Justices of Derbyshire* (7); *Cattell* v. *Ireson* (8); *Taylor* v. *Newman* (9); *Morden* v. *Porter* (10); *White* v. *Feast*. (11)]

Cur. adv. vult.

July 9. The judgment of the Court (Brett and Lindley, JJ.,) was delivered by

LINDLEY, J. This is an appeal from a conviction by the justices of Dunston, in Somersetshire, for an offence against 1 & 2 Wm. 4, c. 32, s. 30.

It appears that the appellant, who is a lad of about thirteen, went by the direction of his father on to Alcombe Common, within

(1) 30 L. J. (M.C.) 207.
(2) 4 B. & S. 585; 33 L. J. (M.C.) 65.
(3) 3 B. & S. 206; 32 L. J. (M.C.) 6.
(4) 30 L. T. (N.S.) 792.
(5) 4 B. & S. 301; 32 L. J. (M.C.) 208.
(6) 7 E. & B. 853; 27 L. J. (M.C.) 28.
(7) 11 W. R. 780.
(8) 1 E. B. & E. 91; 27 L. J. (M.C.) 167. 4 Jur. N.S. 560
(9) 4 B. & S. 89; 32 L. J. (M.C.) 186, 188.
(10) 7 C. B. (N.S.) 641; 29 L. J. (M.C.) 213.
(11) Law Rep. 7 Q. B. 353.

3 Sc & Jur. N.S. 540

the manor of Alcombe, and shot a rabbit in the presence of the gamekeeper of the lord of the manor; and that the lad stated at the time that he had a right to come up there and shoot. It further appears that the father, who is a solicitor, had previously acquired a lease of some land near the common, and had built a house on that land, and had in correspondence with the lord's solicitors claimed in respect of such land, as one of the commoners, rights of common, and also a right of sporting and killing rabbits on the common. The lease, however, did not specify any such rights; nor was any evidence adduced to shew that any of the commoners had ever claimed or exercised a right of killing game or rabbits or of sporting on the commons.

It was objected on the part of the appellant that there was no sufficient evidence of any manor, or that Alcombe Common was within it, or that the prosecutor was the lord; but the justices overruled this objection, and we think rightly, as was stated in the course of the argument.

It was further objected that what was done was done in the exercise of a bonâ fide claim of right, and that the justices had therefore no jurisdiction to convict the appellant. This objection was also overruled, upon the ground that there was no evidence of the existence of the right claimed, and that the setting up of such right did not oust the jurisdiction of the magistrates. The substantial question we have to determine is, whether the justices were right in so holding.

It is not found in express terms whether the appellant or his father claimed the right alleged bonâ fide or not. We are left to draw our own inference as to this point: and we are of opinion that both father and son did assert that claim bonâ fide in a certain sense. We think that the claim of right was not set up as a frivolous pretext to escape a conviction; and that, whatever the father may have believed as to his alleged rights, his son bonâ fide believed that the father had them.

This, under ordinary circumstances, would suffice to render a conviction for any criminal offence improper; for, it is well established that justices cannot try the existence of a right, bonâ fide set up, in answer to a criminal charge brought before them: see Paley on Convictions, 47 and 137, &c. But it has been decided more than once that a person may be convicted under the statute with

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which we have now to deal, and other game statutes, although he had no mens rea, and believed that he was not a trespasser: *Morden* v. *Porter* (1); *Leatt* v. *Vine* (2); *Cornwell* v. *Saunders.* (3)

These game statutes, it is said, are not mere criminal statutes, but are statutes passed for the purpose of protecting the peculiar rights of those entitled to shoot game. The statutes themselves, it has been held, either expressly or by necessary implication, enact that the person charged with the trespass cannot defend himself by shewing merely that he believed he was not a trespasser; he must shew that he had a reasonable ground for such belief. And it has been further held that, where the person charged with such a trespass only sets up a right of a third person, or a right in himself which is impossible in point of law, the magistrates are justified in disregarding such a claim of right as wholly unreasonable.

Although, therefore, where there must be a mens rea to constitute an offence, an honest claim of right, however absurd, would frustrate a summary conviction, yet where, as here, the absence of mens rea is not necessarily a defence, the person who sets up a claim of right must shew some ground for its assertion. This in fact was decided in the cases last referred to. In all of them rights were claimed, but they were such as could not by law exist: see also *Hudson* v. *M'Rae.* (4)

We are of opinion that these principles and decisions are applicable to the present case, and that the magistrates might not improperly have found that the claim set up, although in one sense bonâ fide, was not a fair and reasonable claim of right, and therefore that they were not bound to stop.

Even if such a right as that set up could by law exist, the claim made was so vague and improbable, that, in the absence of all evidence to support either that or some other right on the part of the appellant to shoot rabbits on the common, the justices were entitled to disregard the claim of right altogether, and to convict the appellant.

Conviction affirmed.

Attorney for appellant: *Watkins.*

Attorneys for respondent: *Gregory & Rowcliffes.*

(1) 7 C. B. (N.S.) 641; [29 L. J. (M.C.) 213.

(2) 30 L. J. (M.C.) 207.

(3) 3 B. & S. 206; 32 L. J. (M.C.) 6.

(4) 4 B. & S. 585; 33 L. J. (M.C.) 65.

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RE ANN COLDWELL. 1875 May 22.

Acknowledgment of Deed by Married Woman under 3 & 4 Wm. 4, c. 74—Omissions in Jurat of Affidavit of Verification—Notarial Certificate.

The Court allowed a certificate of acknowledgment under 3 & 4 Wm. 4, c. 74, taken at Loch Haven, Pennsylvania, to be filed, notwithstanding that the jurat of the affidavit of verification was defective, in not naming the place where the acknowledgment was taken, or describing the deponent,—there being a notarial certificate identifying the place and the parties.

A SPECIAL commission was issued directing certain commissioners to take the acknowledgment of a deed for the conveyance of certain property to which she was entitled, by Ann, the wife of John Coldwell, now residing at Loch Haven, Clinton County, Pennsylvania. The acknowledgment was duly taken by Hiram R. Childs and Jesse Merritt, two of the commissioners named in the commission, and an affidavit of the due taking of the acknowledgment was made by Hiram R. Childs, one of the commissioners by whom it was taken, the jurat of which was as follows:—"Sworn and subscribed before me the 29th day of April, 1875. Orrin T. Noble, Alderman."

There was a notarial certificate by Edward P. M'Cormick, a notary public of Loch Haven, Clinton County, Pennsylvania, "that the above affidavit was sworn on that day, in his presence, at Loch Haven aforesaid, that Orrin T. Noble was an alderman and duly commissioned and qualified to administer oaths at Loch Haven, and that the name Hiram R. Childs subscribed to the affidavit, and also the name Orrin T. Noble subscribed to the jurat thereon, were the respective proper handwriting of the said Hiram R. Childs and O. T. Noble."

The officer of the Court under the Fines and Recoveries Act, 3 & 4 Wm. 4, c. 74, having refused to receive the certificate and affidavit of verification, on the ground that the jurat was defective in not stating the place where the affidavit was sworn, and also in omitting the "description" of the deponent,

Warner moved for an order directing the officer to receive and file the documents. As to the first objection, he referred to

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Re Saunderson (1), where the Court allowed a certificate of an acknowledgment taken at Adelaide to be filed, notwithstanding the affidavit of verification omitted to mention the place where the acknowledgment was taken,—there being an affidavit that all the documents came from Adelaide, and that all the parties resided there.

LORD COLERIDGE, C.J. I think that will do. *Re Sarah Chandler* (2) is a distinct authority to the same effect. And I think the second objection is cured by the notarial certificate, which clearly enough identifies the parties.

The rest of the Court concurred.

Order granted.

Attorneys for applicant: *Torr & Co.*

June 19.

[IN THE EXCHEQUER CHAMBER.]

THE AUSTRALIAN AGRICULTURAL COMPANY *v.* SAUNDERS.

Fire Insurance—Proviso that subsequent Insurance should be disclosed—Marine Policy, when Goods covered by—Goods in Stevedore's Warehouse.

The plaintiffs effected a policy of insurance with the defendant as chairman of a fire insurance company, for 3000*l.*, "on wool in bales or fleeces 'greasy' and 'washed,' in all or any shed or store, on station, or in transit to Sydney by land only, or in any shed or store, or any wharf in Sydney, until placed on ship." The policy contained a provision as follows:—"No claim shall be recoverable if the property insured be previously or subsequently insured elsewhere, unless the particulars of such insurance be notified to the company in writing." The plaintiffs subsequently effected an insurance with a Marine Insurance Company to cover 16,500*l.* upon wool, the risk being described as "at and from the River Hunter to Sydney per ships and steamers, and thence per ship or ships to London, including the risk of craft from the time that the wools are first waterborne and of transhipment or landing and re-shipment at Sydney." The frequent practice at the port of Sydney is that wool arriving there for shipment is not delivered direct to the ship for which it is intended, but is conveyed to the stores belonging to the persons who are acting as the stevedores of the ship, and is there pressed, for the purpose of reducing its bulk. By the practice and course of business, the stevedore's receipt is regarded as between the ship and the shippers as equivalent to the mate's receipt, and bills of lading are given in exchange for it. Certain

(1) 8 C. B. (N.S.) 93; 29 L. J. (C.P.) 264.
(2) 1 C. B. (N.S.) 323.

wool belonging to the plaintiffs was forwarded by several consignments by several steamers from the River Hunter to Sydney. The plaintiffs' agent at Sydney had the wool conveyed on its arrival to his own stores, for the purpose of being weighed, and entered into a contract for its conveyance to London on board a ship. The wool was then conveyed from his warehouses to the stores of the stevedores of the ship, who gave the usual receipts for the same. While in the stevedores' warehouses, a portion of the wool was destroyed or damaged by a fire, and the plaintiffs sought to recover such loss upon the policy effected with the defendant's company. The company resisted the claim, upon the ground that the policy of marine insurance above mentioned came within the terms of the provision in the fire policy, and ought to have been communicated to them :—

Held, that the marine policy did not cover the wool in the stevedores' warehouses, and was not such an insurance as the plaintiffs were bound under the provisions in the fire policy to notify to the defendant's company, and that the plaintiffs were therefore entitled to recover.

ERROR from the judgment of the Common Pleas in favour of the plaintiffs, upon a special case, of which the facts were in substance as follows :—

The defendant was the chairman of the Liverpool and London and the Globe Insurance Company.

The plaintiffs, on the 18th of February, 1869, effected, in Sydney, a policy of fire insurance with the defendant's companies for 3000*l.*, in which the risk insured is thus described :—" On wool in bales or fleeces, ' greasy' and ' washed,' in all or any shed or store, on station, or in transit to Sydney by land only, or in any shed or store or any wharf in Sydney, until placed on ship, subject to a limit of 1*s.* 6*d.* on any one pound of ' washed ' wool, and of 10*d.* on any one pound of wool ' in grease.' " The fifth clause in the policy was as follows :—" No claim shall be recoverable if the property insured be previously or subsequently insured elsewhere, unless the particulars of such insurance be notified to the company in writing, and allowed by endorsement hereon, provided that on such notice being given after the issue of the policy, it shall be optional with the company to cancel the same, returning the rateable premium for the unexpired term thereof, and in case of the assured holding any other policy on the same property, subject to average, then this policy is declared subject to average in the same manner, and in no case where any property insured by this policy is insured elsewhere, shall this company be liable to pay more

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than their rateable proportion of the loss or damage." The conditions of average were as follows: "It is hereby declared and agreed that where a sum insured is declared subject to the conditions of average, if the property so covered shall, at the breaking out of any fire, be collectively of greater value than the sum insured thereon, then the company shall pay or make good such proportion only of the loss or damage as the sum so insured shall bear to the whole value of the said property at the time when the fire shall first happen. 2. But it is at the same time declared and agreed that if any property included in such average shall at the breaking out of any fire be insured by any other policy, which, whether subject to average or not, shall apply to part only of the buildings or places, or of the property to which such average extends, then this policy shall not cover the same excepting as regards any excess of value beyond the amount of such more specific insurance, which said excess is said to be under the protection of this policy, and subject to average as aforesaid."

On the 9th of February, 1870, a fire took place at Flood's stores, Sydney, where a large quantity of the plaintiffs' wool had been placed for shipment, and about 182 bales of the plaintiffs' wools were destroyed or damaged. At the time of the occurrence of the said fire, there was other wool of the plaintiffs' in other sheds and stores at Sydney, besides that which was at Flood's stores awaiting shipment as aforesaid. That portion of the plaintiffs' wool which was so delivered as aforesaid at Flood's stores for shipment by the *Sir John Lawrence*, which was not destroyed in the said fire, was ultimately shipped on board the said ship, and the bills of lading for the same were dated the 5th day of March. On the 19th of January, 1870, the plaintiffs effected in London a policy of marine insurance with the Indemnity Mutual Marine Insurance Company to cover 16,500*l.* upon wool. The risk was thus described: "At and from the River Hunter to Sydney, per ships and steamers, and thence per ship or ships to London, including the risk of craft from the time that the wools are first waterborne, and of transhipment or landing and reshipment at Newcastle and Sydney, with leave to touch at all ports and places for all purposes."

The plaintiffs adopt the following different modes of despatching and forwarding their wool from the river Hunter to England. The wool sometimes is conveyed by land to Sydney, and is thence forwarded by ship to England. It is sometimes forwarded by ships from the river Hunter to Sydney, and then re-shipped without being landed; at other times the wool is landed at Sydney and placed in sheds for the purpose of being pressed, and is then re-shipped; and the course is sometimes followed of collecting the wool in stores at Sydney while waiting for a vessel or vessels, and then shipping it for England, either with or without its having undergone the process of pressing. The practice at the port of Sydney, with respect to wool which arrives there for shipment, is that it is not delivered direct to the ship for which it is intended, but is conveyed to the stores belonging to the persons who are acting as the stevedores of the ship. It is then "dumped" or pressed by an hydraulic process for the purpose of reducing its bulk, and afterwards shipped by the stevedores on board the ship. Wool arriving at Sydney in the "grease" for the purpose of being shipped is frequently sent to other places to be scoured prior to shipment. The wool in question in this case was washed wool, and was not greasy, and there is no evidence as to whether or not the plaintiffs ever sent wool in grease to Sydney for shipment. When wool is received at the stevedore's stores, the practice and course of business is that receipts are given by the stevedores, which are regarded as between the ship and the shippers, as equivalent to the mate's receipts, and in exchange for them bills of lading are given on demand whether the wool is in the store or on board the ship. When wool is in the stevedore's stores, it is considered as between the ship and shippers as being in the custody of the ship, and the stevedores make a charge of "dumping and storage" against the ship, in which they include all charges for storing and warehouse room in respect of the wool. The usual and customary mode of dealing with wool brought to Sydney by steamers from the River Hunter for conveyance to London is to remove it by drays from the wharf, where it is landed from the steamer in which it has come from the River Hunter, to the store of the stevedore appointed to receive and dump for the ship then loading for London. The above-mentioned stores are places where

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goods other than wool are stored or warehoused in the ordinary way which are not intended for shipment, and it does sometimes happen that wool is stored there when not intended for shipment, but the principal business carried on at such stores is the dumping and shipping of wool as above described.

The wool in question in this case was forwarded in several consignments by different steamers from the River Hunter to Sydney. Mr. Henry Moore, as the agent of the plaintiffs, took possession of the wool as it was landed from steamers, and had it conveyed to his own stores for the purpose of being weighed. He entered into a contract of affreightment for conveyance thereof on board the ship *Sir John Lawrence* to London, and after such contract had been entered into he caused the wool as it was weighed to be carted to Flood's stores, belonging to Messrs. Read & Co., who had been appointed stevedores of the said ship. The said Messrs. Read & Co. had authority from the master of the *Sir John Lawrence* to receive wool intended to be shipped by that vessel, and they received the wool in question in pursuance of that authority, and gave the usual stevedore's receipts on behalf of the ship accordingly. At the time of the fire before mentioned the said wool was in Flood's stores, under the circumstances above described, for the purpose of being shipped on board the *Sir John Lawrence*, and for protection from the weather until the ship was ready to receive it, and to undergo the ordinary process of dumping for shipment. The conveyance of the said wool in the said steamers from the river Hunter to Sydney, as aforesaid, was a separate and distinct matter from the conveyance thereof from Sydney to London, and took place under separate contracts of affreightment entered into with the owners of the said steamers respectively. It was admitted that prior to the fire no notification had been, or could have been, given to the defendant's company of the fact that a marine policy had been effected with the Indemnity Mutual Marine Insurance Company. It was agreed that the Court should have power to draw inferences of fact, and it was admitted that the plaintiffs were entitled to recover, unless they were deprived of this remedy by means of having effected the marine policy. The question for the Court was, whether the plaintiffs were entitled to recover from the defendant in respect of the loss of the

wool in question. It was agreed that the question of the amount which was to be recovered on the policy, if disputed, should be referred to an arbitrator. The Court of Common Pleas gave judgment for the plaintiffs. On this judgment the defendant brought error.

Manisty, Q.C. (with him *Edwards, Q.C.*), for the defendant. The wool was covered by the marine policy while in the stevedore's warehouses. It was part of the usual course of a voyage from the Hunter river to London that the wools should be landed at Sydney and taken to the stevedore's warehouse, and thence loaded on board the ship that was to convey them from Sydney to London. They are virtually re-shipped when in the stevedore's warehouse. The loss was clearly included in the words "transhipment or landing and re-shipment." If the wool was covered by the marine policy, it was the duty of the plaintiffs, under the provisions of the fire policy, to notify the terms of the marine policy to the company.

Watkin Williams, Q.C. (with him *J. C. Mathew*), for the plaintiffs. The wool was not covered by the marine policy when lost. What takes place with regard to it cannot be considered as forming part of the voyage insured, or as included by the words "landing and re-shipment." Such words, at the utmost, only cover the goods when on land for purposes necessarily incidental to the voyage. They cannot cover the goods while on land for the purpose of being weighed or pressed. There is no statement in the case that there was any universal practice in the trade by which such processes are considered as part of the voyage. Secondly, the mere possibility that the marine policy might cover the wools at some period while they were within the fire policy did not constitute an insurance elsewhere within the terms of the fire policy. The fifth clause of that policy contemplates specific insurance on the same goods for the same risks, not the chance that a floating policy such as the marine policy might cover some minute portions of the risk insured against by the fire policy. These two policies are substantially intended to cover two different classes of risks—one, a terrene risk by fire, the other, marine risks. It is only by accident, for a short time, that the two overlap. It would be absurd that notice of a marine policy should be obliged to be given under

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the fifth clause. [He cited *Harrison* v. *Ellis* (1); *Pelly v. Royal Exchange Assurance Company* (2); *Pearson* v. *Commercial Union Assurance Company.* (3)]

Manisty, Q.C., in reply.

BRAMWELL, B. I am of opinion that the judgment should be affirmed. I think no action could have been maintained against the underwriters on the marine policy in respect of the loss. It seems to me clear that the words of that policy did not cover any loss by fire during the time when the goods were stored on land, as described in the case. The time when they were so on land formed no part of any act of transhipment or landing and re-shipment. The suggestion is that there was a virtual re-shipment when they were delivered to the stevedore. But, in point of fact, they were not on board ship, and we must deal with words, in the absence of any usage, according to their natural ordinary signification. In point of fact, these goods were not in the course of landing and re-shipment. Inasmuch as the loss would not have been recoverable from the underwriters of the marine policy, I think the plaintiffs are not brought within the words of the 5th clause of the fire policy. It is true that there was a subsequent insurance of the goods, but the words must be read with some limitation, or the result would be absurd. The insurance elsewhere must, to be within the clause, be an insurance as to a portion of the risks covered by the policy sued on. If that is so, it seems to me this is not a case of double insurance such as was intended, inasmuch as the plaintiffs could not have recovered this loss on the marine policy. It was argued on the defendant's behalf that a possibility that the same risk might be covered by both the policies was sufficient under clause 5 to defeat the fire policy. I doubt very much whether that is so. I doubt whether a mere possibility that some portion of the risk covered by both policies might accidentally coincide constitutes such a double insurance as was meant. But whether this be so or not, there seems to be no evidence here of any such overlapping of the two policies as referred to; that is, of the possibility of any case in which both policies

(1) 7 E. & B. 465; 26 L. J. (Q.B.) 239. (2) 1 Burr. 341, 350.
(3) Law Rep. 8 C. P. 548.

would have covered the same loss. It is suggested that under the marine policy there might be such a landing and re-shipment going on, as that a portion of the process might involve putting the goods on a wharf under such circumstances that if they were then destroyed by fire the loss would be within the fire policy. The first answer to this appears to me to be that we have no evidence here that there could be such a mode of landing and re-shipment as one process at Sydney. There are no facts stated from which we may conclude that there might be a landing and re-shipment constituting one continuous process, in the course of which the goods might be deposited on a wharf so as to be covered by the fire policy. The words "landing and re-shipment" in the policy are sensible enough, for there might be a landing as a finished, definite operation, and a re-shipment unconnected with it, but the case supposed is of a landing and re-shipment as one continuous process. A second answer seems to be this: though the marine policy should attach to a loss by fire on a wharf while the goods were in the process of landing and re-shipment, such a loss would not be within the fire policy. The latter, it seems to me, applies not to a loss by fire while the goods are on a wharf in the course of a landing and re-shipment, but while they are in a place of storage. For these reasons I think there was not such a double insurance as to vitiate the fire policy, and consequently that our judgment must be for the plaintiffs.

BLACKBURN, J. I am of the same opinion. The action is upon a fire policy upon certain wool which was burned while stored on land at Sydney, and before it was in any sense put on board ship. There was clearly a loss covered by the fire policy, unless the case comes within the 5th clause of that policy. I am inclined to think, if Mr. Manisty could have shewn that the marine insurance covered the wool when deposited in warehouses or stores, it would have followed that the particulars of such insurance ought to have been notified to the defendants, and that not having been done, the insurance was void. I cannot think it would be a reasonable construction of the words to hold that the particulars of this marine insurance ought to have been notified to the company merely because it might happen that during the transit some loss by fire

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might occur which the marine policy might cover. The mere possibility of an accidental overlapping of the two policies in such a way was not, as it seems to me, what was aimed at. The question, therefore, is whether the marine policy covers the goods when stored in warehouses, as in this case. The wools came down from the Hunter river, intended for shipment to England. They were then taken out of the vessels in which they came down, and stored in Moore's warehouses till shipping could be procured for them; and when that was done, they were sent to the warehouses of the stevedore, who acts as agent of the shipowner, and whose receipt of the goods is the receipt of the shipowner. They were there burnt. Primâ facie being on land, they are not covered by the marine policy; but then it is said that the insurance being "at and from the Hunter river and including the risk of craft from the time when the goods are first waterborne and of transhipment or landing and re-shipment," this would include the period while the goods were warehoused in Sydney. Now it might be a very proper and necessary thing to warehouse the wool in Sydney, and it might not be a deviation; but it is a different thing to say that the underwriters are liable for the risk of fire while the wool is in a warehouse or store. There must be express words or some custom by which the period while the wool was so warehoused can be considered as part of the voyage. There is no custom in the present case, and the only words that could be relied on are "landing and re-shipment." These words would cover any damage that might occur whilst the wool was being landed, but not after it was landed and waiting for shipment. It appears to me, therefore, that the marine policy did not cover the wool while in a warehouse. It is, perhaps, just possible that there might be a time while the goods were being landed or being re-shipped during which they would be within the fire policy, but it does not seem to me necessary to decide whether that could be so or not, because I think the meaning of an insurance elsewhere in the fire policy is an insurance specifically covering the same risk and not a mere possibility that at some point another policy should attach.

LUSH, J. I am of the same opinion. I think the goods were not insured elsewhere within the meaning of the fire policy. The

goods were not, in my opinion, covered by the marine policy under the circumstances. That policy was meant primâ facie to cover the goods when afloat. The landing referred to in the policy means, I think, a landing incidental to the prosecution of the voyage for the purposes and in the course of a transhipment. The wool came down to Sydney, and was then taken possession of by the agent of the assured for the purpose of pressing, weighing, and storing, until it was convenient to ship it to London. This was not a landing within the meaning of the marine policy, and that policy ceased to operate because the goods were put in a store for storage purposes, and would not operate again until they were again put afloat. There is no usage upon which the defendants can rely to modify the natural meaning of the policy. Inasmuch as the marine policy had ceased to apply, the second point raised by Mr. Manisty does not seem to arise, but I am disposed to think that a subsequent insurance which only in certain contingencies might possibly cover a portion of the risk covered by the fire policy was not what clause 5 aimed at, but that that clause refers to subsequent insurances obviously intended to cover the same risk.

QUAIN, J. I am of the same opinion. The first question is, whether the loss that occurred was a loss in "landing and re-shipment." This must be determined either by the ordinary meaning of the words or by their meaning as extended by custom. Now, according to the ordinary meaning of the words "landing and re-shipment," these goods were not in the course of being landed and re-shipped. For the words properly refer to something necessarily incidental to the course of the voyage. What was done with the goods here clearly was not so. Then with regard to any extension of the meaning of the words by usage, there is no such usage found in the case. It is found that sometimes one course was pursued with respect to wools coming down to Sydney and sometimes another. Sometimes they were forwarded and re-shipped without being landed at all. As to the second point, I also agree with the rest of the Court. I think that what was intended by the 5th clause of the fire policy was some policy certainly covering the same risk, not a policy such as the marine

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policy under which there was a bare possibility of the two policies covering the same risk at some period.

POLLOCK, B. I am of the same opinion. The first question is, whether by reason of the execution of the marine policy the goods could be said to be insured elsewhere within the meaning of the fire policy. I agree that the marine policy was intended to cover the goods while on a transit to which a landing at some period might be incidental. It is reasonable on the facts to assume here that the parties intended these goods when sent down the river Hunter to go to England. But what occurred when they got to Sydney was not merely something incidental to the transit covered by the marine policy, but something which amounted to a break in it. Though the goods were, when the fire occurred, in the stevedore's warehouse, previously to that there had been a break in the continuity of the transit so as to make them off the policy until re-shipped. The other point is, whether the fact that the policies did or might overlap made the marine policy a subsequent insurance within the meaning of the 5th clause of the fire policy so as to release the defendants. As to that question I agree with what has been said by my Brother Bramwell. We must look to the substance of the provisions as coupled with the average conditions. Having regard to the object of such conditions, it seems to me that it would be quite immaterial to the insurers on the fire policy that the marine policy might possibly cover the same risks as the fire policy for some period of time during the transit.

AMPHLETT, B. I am of the same opinion. With regard to the main question I entirely agree with what has been said by the rest of the Court. With regard to the second point, I doubt whether it is open to the defendants upon the terms of this case, but if it be, I am of opinion that the two policies could never overlap. I venture to think that the only time when the goods could be covered by the marine policy while on shore would be when they were on shore merely for the purpose and in the course of being landed and re-shipped. A loss by fire under those circumstances would be covered by the marine policy. But I do

not think that there are any words in the fire policy which, properly construed, would cover such a loss; for the words "on a wharf" in that policy would not, I think, cover the case of their being on a wharf merely in the course of landing and re-shipment.

Judgment affirmed.

Attorney for plaintiffs: *C. Walton.*

Attorneys for defendant: *Chester, Urquhart, & Co., for Ince & Co.*

Applied. JUDSON *v.* ELLESMERE PORT EX-SERVICEMEN'S CLUB, LTD. [1948] 1 All E.R. 844.

PRENTICE *v.* LONDON, LONGHURST, AND OTHERS. *May* 24.

*Benefit Building Society—Arbitration Clause—*6 *&* 7 *Wm.* 4, *c.* 32, *s.* 4—10 *Geo.* 4, *c.* 56, *s.* 27—18 *&* 19 *Vict. c.* 63, *s.* 40.

To bring a dispute within the arbitration clause of the rules of a benefit building society, it must be one which arises between the trustees and the party claiming *as a member* of the society.

The plaintiff was a transferee for value of shares in a benefit building society. The transferor had been the secretary of the society, and in that capacity had incurred liabilities to the trustees to a considerable amount. The latter, after the transfer, but before they had notice of it, passed a resolution to forfeit the shares of the transferor, and appropriated their value towards the deficit. The plaintiff sued the trustees for refusing to admit him to the benefits to which he claimed to be entitled as a member of the society and as the holder of shares therein. The defendants pleaded that the cause of action was "a dispute between the defendants as trustees, and the transferor as a member, and the plaintiff as a person claiming on account of a member of the society, and was a dispute which according to the rules of the society and the statutes ought to be settled by arbitration:"—

Held, that, as the trustees denied the right of the plaintiff to be a member of the society, they were estopped from saying that the dispute was a dispute between them and him as a member, within the rule.

THE first count of the declaration stated that, before the happening of the grievances thereinafter mentioned, one Foote was a member of the Albion Mutual Benefit Building Society, and possessed of and entitled to certain shares of great value in the said society, in respect of which shares Foote was entitled to divers large sums of money and to divers other benefits and advantages as a member of the said society, which he was entitled to assign and transfer according to the regulations of the said society; that, while Foote was possessed of and entitled to the said shares

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and to the said large sums of money and to the said other benefits and advantages as a member as aforesaid, and before he had done anything to disentitle him therefrom, Foote, for divers large sums of money in that behalf then paid to him by the plaintiff, did transfer, assign, and set over unto the plaintiff all the said shares, to hold the same subject to the payments and regulations prescribed by the society; that the plaintiff agreed to accept and did accept the same, subject to the said payments and regulations; that all things were done and all things happened and all times elapsed necessary to entitle the plaintiff to recover from the defendants as trustees as aforesaid the said large sums of money and other the benefits and advantages of a member of the said society and of the holder of the said shares: yet that the defendants did not nor would pay the said large or any sums of money to the plaintiff, and did not nor would admit the plaintiff to other the benefits and advantages to which he was entitled as a member of the said society and as the holder of the said shares, but thereto wholly refused and made default, whereby the plaintiff had lost the money paid by him for the said shares, and the money and other benefits and advantages to which he was entitled as a member of the said society and as the holder of the said shares.

There was also a count in trover, a count for money had and received, &c., and for money due upon accounts stated. Claim 350*l*.

The material plea was the fourth, which stated that the said society was a benefit building society formed and established under and according to the statute 6 & 7 Wm. 4, c. 32, for the regulation of benefit building societies; that, by the rules of the said society, duly framed, certified, inrolled, and deposited according to the statutes in such case made, it was amongst other things provided that should any dispute arise respecting the construction of the said rules, or any of the clauses, matters, or things therein contained, or on any ground whatever which would affect the interests of the said society, between any of the trustees or officers and any one or more of the members of the said society, or any person or persons claiming on account of any member or members, and which could not be satisfactorily settled by the board of manage-

ment or a majority of members present at a special or general meeting, such dispute or disputes should be referred to arbitration in manner therein mentioned, and that five arbitrators should be elected at the first meeting after the said rules were certified, none of them being beneficially interested directly or indirectly in the funds of the said society, and that in each case of dispute the names of the arbitrators should be written on pieces of paper and placed in a box or glass, and the three whose names were first drawn by the complaining party should decide the matter in dispute: Averment, that the said rule was in full force and effect before and at the time of the accruing of the supposed cause of action and dispute in the first count mentioned, and that the same was a dispute between the defendants as trustees as aforesaid and Foote as a member and the plaintiff as a person claiming on account of a member of the said society, and was a dispute which, according to the said rules of the said society and the statutes in such case made, ought to be settled by arbitration as provided by the said rule; and that all necessary conditions had been fulfilled to entitle the defendants as trustees as aforesaid, and the said society, and to oblige the plaintiff, to have the said dispute so settled. Issue thereon.

The cause was tried before Denman, J., at the sittings in London after last Michaelmas Term. One Foote had been secretary of a society called The Albion Mutual Benefit Building Society and a holder of certain shares therein. The plaintiff claimed to be entitled to those shares under transfers from Foote for valuable consideration executed respectively on the 9th of June, 1871, and the 8th of March and 22nd of November, 1872. The defendants were trustees of the society. In November, 1872, Foote absconded, being then indebted to the society in the sum of 400*l.* On the 14th of January, 1873, the directors passed a resolution to forfeit Foote's shares, and appropriated the whole amount standing to his credit in their books (amounting to 201*l.* 9*s.* 6*d.*) towards the deficit. On the 17th of January, 1873, the society had notice of the transfers.

Upon these facts it was contended on the part of the defendants that the fourth plea was proved, and that the only mode of adjusting disputes between the society and any of its members, or

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persons claiming on account of members, was, by arbitration, and that it was not competent to the plaintiff to maintain an action.

The learned judge directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for 100*l.* if the Court should think the transfers of June the 9th, 1871, and March the 8th, 1872, were all that were included in the security; or for 200*l.* if the Court should think that the transfer of November the 22nd, 1872, was included,—with costs if the Court should think fit.

M'Intyre, Q.C., in Michaelmas Term last, obtained a rule nisi accordingly.

Prentice, Q.C., and *Lumley Smith*, shewed cause. The 27th section of 6 & 7 Wm. 4, c. 32, enacted that "every dispute between any member or members of any society established under this Act or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal." In Burn's Justice, *Friendly Societies*, iii. p. 725 (a), it is said: "These provisions as to arbitration are imperative, and the remedy must be accordingly." For this is cited *Crisp* v. *Bunbury* (1), where it was held that, since 9 Geo. 4, c. 92, an action does not lie against the trustee of a benefit society; but that, in case of disputes, the only mode of proceeding is by arbitration; and *Rex* v. *Mildenhall Savings Bank Trustees* (2), which confirmed the decision in the former case.

[LORD COLERIDGE, C.J. These were cases of depositors. But suppose there was a dispute as to whether the party was a depositor or not?]

The cases are all collected in Pratt's Law of Friendly Societies, 8th ed. 46, in a note upon s. 40 of 18 & 19 Vict. c. 63:—"The direction of this statute," it is said, "as to the reference of disputes, has the effect, so far as regards such disputes, of excluding the jurisdiction of the superior Courts; this was decided in the leading case of *Crisp* v. *Bunbury* (1), and in *Timms* v. *Williams*. (3)

(1) 8 Bing. 394. (2) 6 Ad. & E. 952.
(3) 3 Q. B. 413.

The same point arose in the case of *Ex parte Payne* (1), where, by the rules of a benefit building society it was provided that all matters in dispute should be referred to justices in pursuance of 10 Geo. 4, c. 56, s. 27; and it was held, on motion for a mandamus to the judge of one of the county courts to proceed and hear a plaint levied by one of the members against an officer of the society, that the section of the Act and the rules providing for a cheap, simple, and speedy decision, ousted the jurisdiction of the ordinary Courts. In *Armitage* v. *Walker* (2), upon the construction of the arbitration clause in the Benefit Building Societies Act (3), it was held that neither a Court of law or equity had jurisdiction to alter the award of arbitrators or justices, unless there was error upon the face of it, or it was shewn to have been corruptly obtained. The Vice-Chancellor Wood, in giving judgment, said: 'The legislature intended carefully to provide that these societies should not be dragged before Courts of law or equity. That is the primary matter to which attention must be drawn, and it is necessary to be extremely careful that the jurisdiction of this Court shall not be set up to control the arbitrators so selected, except upon a very clear and distinct case being made out of their abuse of their office.' In *Trott* v. *Hughes* (4), before Vice-Chancellor Cranworth, a bill was filed on behalf of some of the members of the Second Borough of Southwark Benefit Building and Investment Association, against the directors and a portion of the shareholders who concurred in the acts complained of. The plaintiffs alleged that, being dissatisfied with the management, they had, in pursuance of the provisions of their deed of association, given a month's notice of their intention to withdraw from the society, and that the directors had denied their right so to withdraw. The plaintiffs thereupon filed their bill to recover their subscriptions, and by the present motion sought to restrain the directors from transferring or appropriating the funds of the society at the bankers. The defendants contended that the proper course for the plaintiffs, if dissatisfied with the conduct of the directors, was, according to the rules of the society, to appeal to arbitrators duly elected at a meeting for that purpose, and, if that step did not

(1) 5 D. & L. 679.
(2) 2 K. & J. 211.
(3) 10 Geo. 4, c. 56, s. 27.
(4) 16 L. T. 260.

2 Jur. N.S. 13.

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produce a satisfactory result, they were then impowered to apply to two justices of the peace, whose decision would be final. The Vice-Chancellor said that the case was one in which the regulations of the society, and the provisions of the legislature with regard to such associations, permitted the members, in the event of a dispute arising, to bring the case before the directors for their decision; and, if that should be unsatisfactory, to appeal to arbitrators, and ultimately to carry the case before two magistrates for their determination. The plaintiffs, however, had thought proper to apply to the Court to put a construction on their rules, instead of adopting those means of redress which were clearly pointed out by the rules themselves. He was of opinion that there was no necessity for the interference of the Court, and refused the motion, with costs. In *Reeves* v. *White* (1), the Queen's Bench held that the summary remedy provided by the statute for the settlement of disputes by arbitration is conclusive, and ousts the jurisdiction of the superior Courts. In *Grinham* v. *Card* (2), a dispute arose between two of the members of the committee of a friendly society and the trustees touching the distribution of a fund in the hands of the latter, and by one of the rules it was ordered that disputes were to be referred to such members of the committee as should not be personally interested in the matter: and it was held that the judge of the county court had no jurisdiction in such case, according to the rule of the society, which provided for the reference to the committee, and then to private arbitration, of all disputes, and the question now raised was whether this particular dispute was one which could have been the subject of a suit in equity. The Court restrained the judge of the county court from hearing the cause, on the ground that the dispute was one which ought to have been referred under the above rule. These decisions have been followed in the recent cases of *Callaghan* v. *Dolwin* (3) and *Thompson* v. *Planet Building Society*." (4)

[BRETT, J. In *Morrison* v. *Glover* (5), Pollock, C.B., delivering the judgment of the Court, said: "It appears to us that the words

(1) 17 Q. B. 995; 21 L. J. (Q.B.) 169.
(2) 7 Ex. 833; 21 L. J. (Ex.) 321.
(3) Law Rep. 4 C. P. 288.
(4) Law Rep. 15 Eq. 333.
(5) 4 Ex. 430, 444; 19 L. J. (Ex.) 20.

'matters in dispute' must be read matters in dispute between the society and its members *as members*, and not in any other capacity."]

The spirit of the Act is, that the funds of the society shall not be expended in litigation, but that all disputes shall be decided by the domestic forum thereby created. In *Thompson* v. *Planet Benefit Building Society* (1), Sir J. Bacon, V.C., said: "It is quite clear that the statute was intended to encourage, and at the same time to protect, benefit building societies; and a new law and new machinery are created for the purpose of carrying that object into effect. Of that new machinery a very plain feature is, that, assuming that the members of these societies will be numerous, and that many, perhaps all, of them will be poor, the object of the legislature was, carefully to guard against the possibility of any internal dispute being,—to use an expression, I think, of Lord Hatherley in one of the cases (2),—made the means of dragging them into Courts of law or equity."

Darling, for the defendant Longhurst, who pleaded separately, referred to s. 4, which provides that "any member, not having executed a mortgage to the society, who may continue to neglect the payment of his subscriptions until the fines and charges incurred thereon equal the amount of subscriptions already paid by him, shall thereupon cease to be a member, and forfeit all the moneys paid in respect of the shares on which such fines and charges have been incurred," and submitted that a dispute might arise upon that rule which would be properly the subject of arbitration under rule 30, and yet not be between the society and a member.

M'Intyre, Q.C., and *Francis Turner*, in support of the rule, submitted that the plaintiff was entitled to enter a verdict for the larger sum. The contention on the part of the defendants was that 100*l.* only was advanced upon the transfer of the shares, the remainder being advanced without any further security. But, Foote having already transferred his shares to the plaintiff, he had no further control over them, and consequently they remained as security for the whole sum advanced upon them.

(1) Law Rep. 15 Eq. 333. (2) In *Armitage* v. *Walker*, 2 K. & J. 211.

2 Jur. N.S. 13.

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LORD COLERIDGE, C.J. I am of opinion that the nonsuit in this case should be set aside, and a verdict entered for the plaintiff for 200*l.*, but without interest. The contention on the part of the defendants was that this was a benefit building society, and that the policy of the statutes and of the rules founded thereon is, that all disputes arising between the society or its officers and any member shall be determined by arbitration, and shall not be the subject of contention in a Court either of law or of equity; and that this is a dispute within the rule, and consequently that the jurisdiction of this Court is ousted. Many cases have been cited by Mr. Prentice in which, disputes having arisen between the society and persons who were admitted to have been members, proceedings as well in equity as at law have been defeated on this ground. Of these *Crisp* v. *Bunbury* (1) is a strong instance. I do not for a moment dispute the absolute authority of that and other cases: but the present case does not fall within them. This is an action by a man who has advanced money to a member of the society, and has got a transfer of his shares. A dispute has arisen between the transferee and the society, the former claiming to have the benefit of his security, and the latter denying his right, on the ground that they had (after the date of the transfer) cancelled the shares of the transferor, and appropriated their value to a debt which they claim to be due to them from him. The substantial ground of the charge in the declaration is, that the society refuse to allow the plaintiff the rights of a member; and the substantial defence on their part is, that he is not a member, but is claiming under or on account of one who has ceased to be a member: and yet the defendants now insist that that is a dispute between themselves and a member of the society, or one claiming on behalf of a member, and therefore only the subject of an arbitration under their rules. The case seems to me to fall directly within the principle upon which *Morrison* v. *Glover* (2) was decided. This is even a stronger case for the rejection of the arbitration clause than that was. The ingenious argument suggested by Mr. Darling on rule 4 has no application here. This is not a dispute arising between the trustees and one of its members

(1) 8 Bing. 394. (2) 4 Ex. 430; 19 L. J. (Ex.) 20.

or a person claiming on account of a member. The plaintiff is endeavouring to enforce on his own behalf certain advantages which the society deny him on the ground that he is not a member. No case goes the length of holding that such a matter falls within the arbitration clause.

BRETT, J. The first question is, what is the dispute between these parties; and the next, whether the plaintiff is precluded by any statute or rule from enforcing his claim in a Court of law. Now, the plaintiff claims to be entitled to certain shares in the society, as the legal transferee from one Foote; and the answer set up by the trustees is, that he is not the legal transferee, because, although Foote assumed to transfer the shares in question to him for a valuable consideration, they (the trustees), after the date of the transfer, cancelled the shares on account of certain pecuniary claims which they asserted they had against Foote wholly unconnected with those shares. The substantial ground of defence, therefore, is, that the plaintiff is not a member of the society; and the question is whether the dispute is one which can be litigated in this Court, or whether the plaintiff is ousted of his ordinary legal remedy by reason of the enactment in s. 27 of 6 & 7 Wm. 4, c. 32, on the ground that it is a dispute between the trustees and a member or one claiming on account of a member. In *Morrison* v. *Glover* (1) it was admitted that the plaintiff was a member of the society: but the Court of Exchequer decided that that was not sufficient to bring the case within that section, but that it must be shewn that the subject-matter in dispute is one arising between the trustees and a member of the society *as a member*. A dispute as to whether a party is a member or not clearly is not a dispute between the society and the plaintiff as a member. That being so, rule 30 does not oust the jurisdiction of this Court. On the part of the defendants it is contended that the 4th plea was proved. That plea, however, carefully abstains from stating that the plaintiff is a member of the society. I should say the plea would be had on demurrer; and, if so, every material allegation in it must be proved. Now, the allegation

(1) 4 Ex. 430; 19 L. J. (Ex.) 20.

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that the plaintiff was a person claiming on account of a member was clearly disproved. He claims, not on account of Foote, but on behalf of himself as transferee of Foote's shares. As to the suggestion of Mr. Darling, I should say that it is very doubtful whether such a dispute as is mentioned in rule 4 would be a dispute within the statute at all. That rule relates to rights given to the society to forfeit shares under certain conditions. If the dispute were as to the right of the trustees to forfeit, that might be within the statute and rule 30. Then, as to the damages. I think the plaintiff is entitled to recover the full value of the shares of which the defendants have deprived him.

GROVE, J. I am of the same opinion. The cases clearly establish what was the object of the statute, viz. to provide a cheap and speedy mode of settling differences between these societies and their members as to their internal regulations. The plaintiff would be entitled to the benefit of the arbitration clause if he acquired the status of a member. But the defendants are seeking to deprive him of the benefit of membership by declaring the shares of which he is transferee for value cancelled. They say that he is bound by the arbitration clause as a member, and yet their conduct shews that the matter in dispute is whether he shall be a member or not. The fourth plea clearly is not proved. The plaintiff is claiming for himself, and not on account of Foote.

LINDLEY, J. I am of the same opinion. The object of the provision in question was the easy settlement of internal disputes between the trustees and officers of the society and its members. That assumes the parties both to be members of the body. If the matter in controversy is whether the party is a member or not, that clearly is not a matter of internal arrangement.

Rule absolute accordingly.

Attorneys for plaintiff: *Paterson, Son, & Garner.*
Attorney for defendants: *Henry R. Sylvester.*

WIRTH *v.* AUSTIN.

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June 8.

Lord Mayor's Court—Jurisdiction—Cheque payable at a Place out of the Jurisdiction, where the Drawer (the Defendant) has no Effects.

The plaintiff sued the defendant in the Mayor's Court, London, as drawer of two cheques upon the Huddersfield branch of the Midland Banking Company. In answer to a rule for a prohibition, it was sworn that the cheques were drawn and indorsed by the payee to the plaintiff in London, that the drawer had no effects in the hands of the Midland Banking Company, and that he had long since had notice from the bank that cheques drawn by him would not be paid unless previously provided for:—

Held, that, there being no obligation on the plaintiff to prove presentment and dishonor, there was no ground for a prohibition.

THIS was an action brought against the defendant in the Lord Mayor's Court, London, to recover the amount of principal and interest due upon two cheques for 20*l.* and 12*l.* respectively, purporting to be drawn by the defendant in Huddersfield upon the Huddersfield branch of the Midland Banking Company, whose agents in London are the London and County Bank, on the 29th of January and 2nd of February, 1875, payable to A. G. Herzfeld or order, and by him indorsed to the plaintiff, and which were returned "not provided for."

Upon affidavits that the defendant did not reside or carry on business within the city of London, and had no account "with the Midland Banking Company referred to in the said cheques at the offices of the London and County Bank, their London agents," and that the cause of action did not wholly arise within the jurisdiction of the Lord Mayor's Court, London, and after judgment signed,

Glyn obtained a rule to prohibit the Mayor's Court from further proceeding in the action, on the ground of want of jurisdiction.

Finlay shewed cause upon affidavits which stated, that the cheques were drawn by the defendant and indorsed by Herzfeld in London, and the cash for them was obtained from the plaintiff within the city of London; that the defendant had not at the time the cheques were so drawn, nor had he for many months had, any

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funds at the Huddersfield branch of the Midland Banking Company; that long previously to the drawing of the cheques he had had notice from the bank that cheques drawn by him would not be paid by the bank unless previously provided for; and that no provision had been made to meet the cheques in question. It was thereupon submitted, upon the authority of *Terry* v. *Parker* (1) and *Carew* v. *Duckworth* (2), that, inasmuch as the defendant had no funds at the Huddersfield branch of the Midland Banking Company, and had no reason to expect that his drafts would be met there, there was no obligation on the plaintiff to prove presentment and dishonor, and consequently that no part of his cause of action arose without the city of London.

Glyn, in support of the rule, contended that the cases referred to applied only where both parties had reason to know that a presentment at the place where the cheque or bill is made payable will be futile.

LORD COLERIDGE, C.J. The rule for a prohibition in this case was granted upon the ground that the whole cause of action did not arise within the jurisdiction of the Lord Mayor's Court. The cheques upon which the action is brought were drawn upon the Huddersfield branch of the Midland Banking Company, out of the jurisdiction of the Mayor's Court; and it is said that the action is not maintainable without proof of a presentment and dishonor there. Mr. Finlay seeks to get rid of that difficulty by shewing that no proof out of the jurisdiction was necessary here, inasmuch as, not only had the defendant no effects there at the time of drawing the cheques, but he had for some months had notice from the bank that no further cheques of his would be paid unless previously provided for, and that these cheques had not been provided for, and consequently the defendant had no reasonable ground for supposing that they would be honored: and in support of this view two cases are relied on. One of these, *Terry* v. *Parker* (1), is cited in Byles on Bills, 11th ed. p. 216, as an authority for this proposition,—"Absence of effects in the drawee's hands will, as against the drawer, dispense with the necessity of presenting for payment; but not as against a subsequent

(1) 6 A. & E. 502. (2) Law Rep. 4 Ex. 313.

indorsee." For the last proposition is cited *Saul* v. *Jones*. (1) Now, this is an action by indorsee against drawer, and therefore falls directly within the authority cited in Byles. I find also in Bullen & Leake, 3rd ed. p. 99, a precedent for a declaration against a drawer for non-payment of a bill, with an averment of excuse of notice of dishonor in these terms,—"And the said G. H. (the drawee) had not at any time any effects of the defendant, nor had the defendant at any time any reasonable ground to expect that the said G. H. would have any such effects or would pay the said bill, nor was there at any time any consideration or value for the payment thereof by the said G. H., nor has the defendant sustained any damage by reason of not having notice of the dishonor of the said bill;" and *Terry* v. *Parker* (2) is cited as the authority for that. That case is in principle the same as this, except that that was the case of a bill of exchange, this of a cheque. The fact, therefore, upon which Mr. Glyn relied having been explained away, there was no need of proving anything arising without the jurisdiction to entitle the plaintiff to sustain his action, and the rule must be discharged.

GROVE, J. The drawer undertakes to meet the cheque at Huddersfield, well knowing that he has no effects there, and that it will not be paid. As against him, therefore, there was no necessity for proving a presentment there.

ARCHIBALD, J. Under the circumstances, a presentment and dishonor of the cheque at Huddersfield was no necessary part of the plaintiff's cause of action at all.

Rule discharged.

Attorney for plaintiff: *G. F. Gray.*
Attorneys for defendant: *Green & Pridham.*

(1) 1 E. & E. 59; 28 L. J. (Q.B.) 37. (2) 6 A. & E. 502.

1875
June 12.

PLANT *v.* KENDRICK AND ANOTHER.

Practice—Inspection of Documents admitted to be in the Defendant's Possession or Power.

Where, in answer to interrogatories, the defendant admits that he has certain documents in his custody, possession, or power, it is not competent to him, upon an application for leave to inspect and take copies of them, to urge that others have an interest in them, and therefore he cannot produce them.

IN 1874, a so-called syndicate, consisting of the plaintiff, the two defendants, Kendrick and Massey, and several other persons (of whom Kendrick acted as secretary), was formed for the purpose of promoting a company to be called The Royal Aquarium and Summer and Winter Garden Society Limited, and inviting subscriptions for shares. An agreement was entered into by the persons composing the syndicate for providing funds to meet the preliminary expenses.

The plaintiff, as one of the original members of the syndicate, sued the defendant Kendrick as secretary and the defendant Massey as a member of the syndicate to recover 400*l.* which he alleged he would have received had his name not been improperly erased from the list of members.

In answer to interrogatories delivered pursuant to a judge's order, the defendant Kendrick admitted that a sum of 6000*l.* had been received by him as secretary on behalf of the syndicate, and was paid by him to the members of the syndicate whose names were set out, to the exclusion of the plaintiff, whose name had, by a resolution of the 21st of July, 1874, been erased from the list of members of the syndicate, in consequence of his having made default in payment of his subscription according to the above-mentioned agreement: and both defendants admitted that they had in their custody, possession, or power, the following documents relating to the matters in dispute, viz.

1. The agreement before referred to.
2. The prospectus of the proposed company.
3. Copy letter from H. Kendrick to the syndicate, dated July 17, 1874.

4. Copy letter from H. Kendrick to the defendant, dated July 20, 1874.

5. The like, dated July 21, 1874.

6. Minutes of proceedings of the syndicate and their committee.

7. Letter from defendants' attorney to Mr. Shearman, the plaintiff's attorney, dated the 14th of August, 1874, and the papers and pleadings in this action.

A summons was thereupon taken out calling upon the defendants to shew cause why the plaintiff or his attorney should not be at liberty to inspect and take copies of or extracts from such documents. Upon the hearing of this summons Pollock, B., made an order for inspection, but confined it to the agreement.

Anderson obtained a rule nisi in the terms of the last-mentioned summons.

Oppenheim shewed cause. If this had been an action against the syndicate, the plaintiff might have been entitled to inspect the minute-book. But the action is against two only of that body, and they cannot be compelled to produce a document which does not belong exclusively to them. Besides, the plaintiff, being a partner with the others, cannot sue upon the agreement.

Anderson, in support of the rule. The defendants, having by their answers to the interrogatories admitted that the minute-book of which inspection is sought is in their possession or under their control, it is not open to them now to say that others have an interest in it and therefore they cannot produce it. [He referred to *Hunt* v. *Hewitt* (1) and *Hill* v. *Campbell.* (2)]

LORD COLERIDGE, C.J. This is an application for leave to inspect and take copies of certain documents which are stated in the affidavit upon which the application for interrogatories was founded, and admitted in the affidavits in answer, to be in the custody, possession, or power of the defendants. The only document as to which any question arises is the minute-book kept by one of the defendants as secretary to a set of persons calling themselves a syndicate, in which book are kept records of the meetings of the

(1) 7 Ex. 236; 21 L. J. (Ex.) 210. (2) Law Rep. 10 C. P. 222.

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syndicate. The plaintiff alleges himself to have been and still to be a member of the syndicate, and to have as such a right to inspect this book, inasmuch as he is interested in the entries made therein. The facts are admitted; but the defendants object to produce the book, on the ground that all the members of the syndicate have an interest in it, that the plaintiff has ceased to be a member, and that the action is brought against two only of the body. If this had been an ordinary application for leave to inspect and take copies, the defendants might have objected that the documents belong to other persons not before the Court and that, though they are in the possession or custody of the defendants, those other persons decline to allow their production. But, having in answer to interrogatories admitted that they are in their custody, possession, or power, it is not competent to them now to raise that objection. Upon the admitted facts the plaintiff is entitled to inspection, and the defendants have offered no answer. The rule must therefore be made absolute.

BRETT, J. I am entirely of the same opinion. Possibly the defendants might have had an answer to this application, but they have not set it up in a way to make it available. The answer relied on is in substance this,—At the time I (the secretary) received the 6000*l.*, you, the plaintiff, having made default in payment of your subscriptions under the agreement, had ceased to be a member of the syndicate; and, if you are a member of the syndicate, you are a partner with the other members, and therefore cannot sue upon the agreement. Until the time of his expulsion, at all events, the plaintiff had an interest in the book. It may be that, if the defendants had shewn that they were prevented from producing the book by persons who are not before the Court, that would have been an answer to an application for an order for its production. But, after the admission made in answer to the interrogatories, it is too late to raise that objection now.

GROVE and LINDLEY, JJ., concurred.

Rule absolute.

Attorney for plaintiff: *J. G. Shearman.*
Attorneys for defendants: *Wild, Barber, & Browne.*

THORNTON AND OTHERS *v.* MAYNARD. 1875 *July* 9.

Bill of Exchange—Part Payment by Drawer—Equitable Set-off by Acceptor—Bankrupt Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 39.

To a declaration by the holder against the acceptor of several bills of exchange, the defendant pleaded, by way of equitable defence, that the drawers became bankrupt, and that the plaintiff received 425*l.* as a dividend from their estate on account of the bills, and as to that sum was suing only as trustee for the drawers; and the plea claimed to set off a debt due to the defendant from the drawers:—

Held, a good equitable defence pro tanto.

THE declaration contained nine counts upon nine several bills of exchange drawn respectively by Rutty & Co. upon and accepted by the defendant, and indorsed by Rutty & Co. to the plaintiffs, and also a count upon a promissory note drawn by the defendant payable to the plaintiffs, and the money counts and a count for interest.

The defendant pleaded to the first nine counts an equitable plea, as follows:—For a defence on equitable grounds as to the sum of 425*l.*, parcel of the plaintiffs' claim in respect of the first nine counts of the declaration, the defendant says that, after the acceptance of the said several bills, T. B. Jones was duly appointed trustee of the estate and effects of John Rutty & Co., and their property became and was and is vested in such trustee under a liquidation by arrangement pursuant to and within the meaning of the Bankruptcy Act, 1869, Part V., and that the plaintiffs, being such holders and indorsees of the said bills of exchange as in the declaration mentioned, were, long before this suit, paid by such trustee, and received, out of the estate and effects of Rutty & Co. so vested as aforesaid, the sum of 425*l.* to which this plea is pleaded, being a dividend on the amount of the said bills payable to the plaintiffs by Rutty & Co. as drawers of the bills, and that the plaintiffs have thence hitherto had and still have no beneficial interest whatsoever therein, and that they are suing for the said sum of 425*l.* parcel &c. only as trustees and agents for T. B. Jones as such trustee as aforesaid, and for the benefit of the said estate of Rutty & Co., and not otherwise: and the defendant further

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says that, before and at the time of the said liquidation by arrangement, Rutty & Co. became and were and still are indebted to the defendant in an amount equal to the plaintiffs' claim in respect of the matter herein pleaded to, for money payable by Rutty & Co. to the defendant for bricks and goods sold and delivered, and bricks and goods bargained and sold by the defendant to Rutty & Co., &c.: and the defendant further says that, at the time of Rutty & Co. becoming indebted to the defendant as aforesaid, they became so on the faith of the defendant being indebted to them, and of his liability to them in respect of the bills of exchange in the first nine counts mentioned; and the defendant is willing to set off and claims equitably to be entitled to set off the amount of the said debt so due and owing from Rutty & Co. to the defendant against the plaintiffs' claim in respect of the matter herein pleaded to, pursuant to the statute in such case made and provided and also the said Bankruptcy Act, 1869.

To this plea the plaintiffs demurred, on the ground that it substantially amounted to a plea of payment by the drawers, without the acceptor being party to the transaction. Joinder in demurrer.

May 3. *R. G. Williams, Q.C.* (*Lumley Smith* with him), in support of the demurrer. The substance of the plea is this, the holders of the bills have received from the drawers 425*l.* in part discharge of their liability on the bills, and therefore quoad that sum they are suing as trustees for the drawers; and I, the acceptor, have an equitable right to set off a debt due to me from the drawers. The first part of the plea clearly affords no defence; payment by the drawers being no defence to an action against the acceptor, whether of the whole or of part of the amount of the bill: *Jones* v. *Broadhurst* (1); *Agra and Masterman's Bank* v. *Leighton* (2); and the second part depends upon the mutual credit clause of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 39; but that clause applies only to credits between the bankrupt and the person suing: see *Turner* v. *Thomas* (3), where Wills, J. (4), says: "The 39th section of the 32 & 33 Vict. c. 71 is a section intended for the settlement of all proceedings between the bankrupt and per-

(1) 9 C. B. 173.
(2) Law Rep. 2 Ex. 56.
(3) Law Rep. 6 C. P. 610.
(4) Law Rep. 6 C. P. at p. 615.

sons dealing with him; and there seems no reason for bringing in persons standing outside, who cannot have the same benefits. It is a settlement appropriate to bankruptcy, and not to persons who are solvent. That is one reason. Another is, that the principle of *George* v. *Clagett* (1) applies only to what may be said to be the proximate motive of dealing with the factor; and the contingency of his bankruptcy and the mode of settling accounts with his assignees cannot be said to have been contemplated. The defence here attempted to be set up is not a defence against the factor, but only a special mode of settling accounts with his assignees upon his bankruptcy, and therefore is not one of the defences falling within the principle of *George* v. *Clagett.* (1) And see Williams on Bankruptcy, p. 56. The plea, therefore, is neither good as a legal nor as an equitable defence.

Baylis, Q.C., contrà, contended that the plaintiffs, having been paid a part of the amount of the bills by the trustee under the bankruptcy of the drawers, were as regards the sum so paid trustees for them, and consequently the defendant had a right in equity to set off against their claim on the bills any claim which but for the intervention of the trust he could have set off against the drawers. He cited *Cochrane* v. *Green* (2), *Clark* v. *Cort* (3), *Elkin* v. *Baker* (4), and *Booth* v. *Hutchinson.* (5)

R. G. Williams, Q.C., was heard in reply.

Cur. adv. vult.

July 9. The judgment of the Court (Lord Coleridge, C.J., and Brett and Archibald, JJ.,) was delivered by

LORD COLERIDGE, C.J. This was a demurrer to an equitable plea.

The declaration contained nine counts on nine bills of exchange, and it contained other counts not now necessary to be referred to. The plaintiffs were the indorsees of the bills; the defendant was the acceptor; Messrs. John Rutty & Co. were the drawers.

The defendant pleaded an equitable plea to the counts on the

(1) 7 T. R. 359.
(2) 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97.
(3) Cr. & Ph. 154.
(4) 11 C. B. (N.S.) 526; 31 L. J. (C.P.) 177.
(5) Law Rep. 15 Eq. 30.

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bills, as to 425*l.*, parcel of the amount claimed, that the drawers became bankrupt, and that the plaintiffs received 425*l.* as a dividend on the amount of the bills due from the drawers to the plaintiffs as indorsees, and that, as regards the 425*l.*, the plaintiffs sue only as trustees for the drawers. The plea then goes on to plead a set-off of a debt due to the defendant, the acceptor, from the drawers of the bills.

We are of opinion that the plea is good. The legal position of the parties is ascertained by the case of *Jones* v. *Broadhurst.* (1) The judgment of Cresswell, J., in that case reviews the authorities, and finally decides that payment either partially or in full by the drawer to the indorsee does not disentitle the indorsee to sue the acceptor for the full amount of the bill. But Cresswell, J., intimated that the indorsee, on recovering from the acceptor, was trustee for the drawer to the amount, whatever it might be, of the drawer's payment. And Sir John Byles adopts his view: "To an action," says he, "against the acceptor, payment by the drawer is no plea, but only converts the holder into a trustee for the drawer when the holder afterwards recovers from the acceptor:" Byles on Bills, 10th ed. 210. And this is equally true, as the context in Sir John Byles's book shews, whether the payment by the drawer was of part of the bill or of the whole.

So far, therefore, as the first half of the plea is concerned, it would of itself be no answer to the action. The plaintiffs would be entitled to recover the amount to which the plea is pleaded, and to hold the amount as trustees for the drawers. In the case before us, however, the indorsees under the circumstances sue for the amount as trustees for the drawers; and in this state of facts the case of *Cochrane* v. *Green* (2) appears to be an authority in point. It was there held that a judgment debt recovered in the name of a trustee, which, if recovered in the name of the cestui que trust, would have been a good set-off at law against the plaintiff's claim, may be pleaded as an equitable set-off. The present is the converse case. The plaintiffs sue as trustees; the defendant sets off a debt due from the cestui que trust: but the principle which governs is manifestly the same; for, if the action had been

(1) 9 C. B. 173.

(2) 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97.

brought by the cestuis que trust, i.e. the drawers, against the defendant, their debt to the latter might have been pleaded as a legal set-off. Still more directly in point is the case of *Agra and Masterman's Bank* v. *Leighton*. (1) That was an action on a bill of exchange, by the indorsee against the acceptor. One of the pleas was to this effect,—that the bill was accepted by the defendant by way of payment for goods agreed to be sold and shipped for him by the drawer, and that the defendant only received a portion of the goods, amounting to 1200*l.*; that there was no consideration for the bill except the said sum of 1200*l.*; that the drawer paid the full amount of the bill to the plaintiff; and that the defendant had a set-off against the drawer to the extent of 1200*l.* This was held a good equitable plea; and the judgment of Mr. Baron Channell is a clear authority that the indorsee who has been paid by the drawer, when he sues the acceptor on the entire bill, sues, as regards the amount which the drawer has paid him, as trustee for the drawer; and the ground of the learned Baron's judgment is that the set-off in the case before him was of a debt due to a defendant from a cestui que trust in an action by a trustee.

These cases, then, and the cases of *Elkin* v. *Baker* (2) and *Clark* v. *Cort* (3), appear to establish the soundness of the two propositions following,—1. That the holder, having been paid a part of the bill by the drawer's trustee, sues as regards that sum as trustee for and for the benefit of the drawer's trustee; and, 2. That, where the plaintiff is suing merely as trustee, and the defendant has a claim against the cestui que trust which but for the intervention of the trust could have been set off at law, such claim can be set off in equity. If, then, these two propositions are sound,—and we think they are,—it follows that the plea is good, unless the bankruptcy makes any difference. We think it does not.

If this had been an action by the drawers' trustee in liquidation, the claim of the acceptor against the drawers' estate could have been set off at law. The substantial identity of proceedings in liquidation with proceedings in bankruptcy was held, upon a variety

(1) Law Rep. 2 Ex. 56. (2) 11 C. B. (N.S.) 526; 31 L. J. (C.P.) 177.
(3) 1 Cr. & Ph. 154.

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of authorities, by this Court in *Megrath* v. *Gray* (1); and, since the statute of 5 Geo. 2, c. 30, if this had been an action by the assignee in bankruptcy, or (now) the trustee in liquidation, the set-off could have been pleaded in a legal plea; that is to say, the set-off here would have been good at law but for the intervention of the trust, and therefore it is good in equity.

We do not think the objection to this view well founded which was suggested to follow from the case of *Turner* v. *Thomas*. (2) That was a case of principal and factor; and this Court declined to extend the rule in *George* v. *Clagett* (3) to a case where the factor had become bankrupt and it was proposed to set off mutual credits. Willes, J., observed that the object of the mutual credit clause was to settle the affairs of bankrupts, and not the affairs of solvent persons. But that was a very different case from the present; and it is clear that, in *Turner* v. *Thomas* (2), if the action had been by the bankrupt's trustee, and for a liquidated claim, the claim of the defendant against the bankrupt's estate could have been set off.

On the whole, therefore, it appears to us that the plea is good, and that there must be judgment for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *Tilliard, Gordon, and Holme.*
Attorneys for defendant: *Tilley & Soames.*

(1) Law Rep. 9 C. P. 216. (2) Law Rep. 6 C. P. 610.
(3) 7 T. R. 359.

SARAH FELL AND JOSEPH FELL *v.* THOMAS BIDDOLPH, SARAH ARMSTRONG, THOMAS ARMSTRONG, AND OTHERS.

1875
July 9.

Will, Attestation of—Devise to "Children" as a Class, as Tenants in Common—Wills Act (7 *Wm.* 4 *&* 1 *Vict. c.* 26), *ss.* 9, 15.

Testator devised lands to his niece Sarah for life, and after her death to her husband Joseph for his life, and then "to be equally divided among the children of the above-named Joseph a d Sarah, either by the proceeds from the sale of the properties or otherwise, as may be considered most advantageous at the time."

There were eight children of the niece living at the date of the will and at the death of the testator, of whom two were respectively named Thomas and Sarah.

Thomas was an attesting-witness to the will. Sarah was present when the testator executed the will, but she did not sign it in his presence so as to make her a good attesting-witness within the Statute of Wills:—

Held, that the devise was to the "children" as a class, as tenants in common; and that, as the attesting-witnesses (assuming Sarah to have been an attesting-witness) were by reason of the Statute of Wills, s. 15, incapable of taking at the death of the testator, they could not be reckoned as members of that class, and their shares, therefore, went to the rest of the class, the other children, and not to the heir-at-law.

Quære, whether Sarah could be considered as an attesting-witness at all?

THIS was an action of ejectment brought to recover certain property situate in Hulme, near Manchester, tried at the Manchester Summer Assizes, 1874, before Archibald, J.

The plaintiffs claimed under the will of Joseph Booth, late of the York Hotel, Renshaw Street, Hulme, dated the 11th of March, 1860, which was as follows:—

"I give and bequeath unto Mrs. Maria Hinton, sister of my late wife, the sum of 100*l.*, and unto Mrs. Hannah Mainwaring, of Deansgate, Manchester, the sum of 100*l.*: also to the hereinafter-named children of my late niece, Mrs. Esther Johnson, late of Harpurkey, I give and bequeath the sum of 10*l.* each, to be paid in the manner and at the times following, providing they are then living, that is to say, Sarah, Elizabeth, Jane, Anne, and Mary are to receive the money when they arrive at the age of twenty-one years; and the others, David, John, and George, to receive the money when they arrive at the age of fourteen years, for the purpose of binding them apprentices, to enable them to learn a trade. I also give and bequeath unto my niece Mrs. Sarah Armstrong the whole of the residue of my property, both freehold,

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leasehold, and personal, furniture, cash, &c., for her life-time, for her own sole personal use and benefit, to the intent that neither her husband, his creditors, or any other person, shall have any control over it: but, if she should die first before her husband, Mr. Joseph Armstrong, clock-maker, 88 Deansgate, Manchester, I then give it to him for his life-time; after which all my lands and houses in Boot Street, in Trent Place, and Renshaw Street, in Hulme, and also my land and houses, and chief or ground-rents in Regent Street, Salford, to be equally divided among the children of the above-named Joseph and Sarah Armstrong, either by the proceeds from sale or otherwise, as may be considered most advantageous at the time. And I hereby authorize my executors to receive all moneys owing to me, and to pay all my just debts, if any, also all probate, legacy, testamentary, funeral, and other expenses attending the above, out of the first moneys arising from the estate, and also to keep in repair and insure the above properties. And I hereby appoint the above-named Joseph Armstrong and likewise Thomas Armstrong, of 2 Albert Place, Manchester, joint trustees and executors. In witness," &c.

The attestation was as follows:—"Signed by the said testator, Joseph Booth, in our presence. Witnesses, Eliza Brunton, Thomas Armstrong, Sarah Armstrong."

Two of these witnesses, viz. Thomas Armstrong and Sarah Armstrong, were two of the "children" of the tenants for life, Joseph and Sarah Armstrong. Thomas was in every respect a regular attesting-witness. Sarah was present when the testator signed the will, and saw the other two attest it; but she went downstairs, and there, at the suggestion of one of the others, put her name to the attestation clause. She, however, was not treated as an attesting-witness when probate was taken out.

At the trial it was contended on the part of the plaintiffs (who were devisees of the heir-at-law of the testator) that the devise to Thomas and Sarah failed by reason of the enactment in s. 15 of the Statute of Wills, 7 Wm. 4 & 1 Vict. c. 26, that, "if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, &c., shall be thereby given or made, such devise, &c., shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife

or husband, be utterly null and void," &c.; and that consequently their shares, two-eighths of the property, lapsed and went to the heir-at-law.

For the defendants it was contended that, the devise being to a class, and not by the will apportioned amongst the individual members of the class, the undivided shares of Thomas and Sarah would go to the remaining six, and not to the heir-at-law; and that, at all events, Sarah, not being an attesting-witness within the meaning of s. 9 (1) of the statute, was not by her subsequent signature to the attestation clause rendered incapable of taking her share.

Under the direction of the learned judge, a verdict was entered for the defendants, leave being reserved to the plaintiffs to move to enter a verdict for them for one-eighth or two-eighths of the property in question, if the Court should be of opinion that there was an intestacy as to the shares of Thomas and Sarah, or either of them.

C. Russell, Q.C., in Michaelmas Term, 1874, obtained a rule nisi accordingly.

June 2, 1875. *Joshua Williams, Q.C.*, and *Ambrose, Q.C.*, shewed cause. Sarah, they submitted, was not an attesting-witness within the Act, and therefore not deprived by what she did of the benefit of the devise. Thomas was an attesting-witness: but, the gift being to the "children" as a class, the effect of his disqualification was simply to cut him out of the class, leaving the rest of the class to take his share. They referred to *Wigan v. Rowland* (2), *Randfield* v. *Randfield* (3), *Emanuel* v. *Constable* (4), *Brett* v. *Brett* (5), *Foster* v. *Banbury* (6), *Lees* v. *Summersgill* (7), *Dimond* v.

(1) 7 Wm. 4 and 1 Vict. c. 26, s. 9: "No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned, that is to say, it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator: but no form of attestation shall be necessary."

(2) 11 Hare, 157.

(3) 32 L. J. (Ch.) 668; 8 H. L. C. 225, 229.

(4) 3 Russ. 436.

(5) 3 Add. 210; 1 Hagg. Eccl. 58, n.

(6) 3 Sim. 40.

(7) 17 Ves. 508.

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Bostock (1), *Shaw* v. *M'Mahon* (2), *Clarke* v. *Phillips* (3), *Knight* v. *Gould* (4), *Olney* v. *Bates* (5), *Browne* v. *Hammond* (6), *Doe* d. *Stewart* v. *Sheffield* (7), *Page* v. *Page* (8), *Young* v. *Davies* (9), and *Humphrey* v. *Tayleur*. (10)

C. Russell, Q.C., *Herschell, Q.C.*, and *W. F. Robinson*, in support of the rule, submitted that Sarah Armstrong, though not an attesting-witness within the Statute of Wills, yet, being a witness de facto, forfeited her share under the devise in Joseph Booth's will; that the class to take under that devise must be ascertained or ascertainable at the death of the testator; that, the gift being to the class as tenants in common, the testator intended to give an aliquot part to each individual of the class, to be ascertained at his death; and that, as Thomas and Sarah were living at that time, their shares, being forfeited, passed to the heir-at-law. They distinguished the cases cited on the part of the defendants, and referred to *Cresswell* v. *Cheslyn* (11), *Skrymsher* v. *Northcote* (12), and *Humble* v. *Shore*. (13)

LORD COLERIDGE, C.J. We entertain no serious doubt in this case: but, as it is one of first impression, and of importance for the future guidance of the profession, we think it better to give our reasons in writing.

Cur. adv. vult.

July 9. The judgment of the Court (Lord Coleridge, C.J., and Grove and Archibald, JJ.) was delivered by

LORD COLERIDGE, C.J. This was an action of ejectment tried before Archibald, J., at the Manchester Summer Assizes, 1874, to recover certain land, houses, and ground-rents in Hulme and Salford.

The plaintiffs were the devisees of the heir-at-law of Joseph Booth, and at the trial a verdict was found for the defendants, who

(1) Law Rep. 10 Ch. 358.
(2) 4 Dr. & W. 431.
(3) 17 Jur. 886.
(4) 2 M. & K. 295.
(5) 3 Drew. 319.
(6) Johns. 210.
(7) 13 East, 526, 534.
(8) 2 P. Wms. 489.
(9) 2 Dr. & Sm. 167; 32 L. J. (Ch.) 372.
(10) Amb. 136.
(11) 2 Eden, 123.
(12) 1 Swanst. 566.
(13) 7 Hare, 247.

claimed in respect of a devise by Joseph Booth in his will, dated the 11th of March, 1860. The testator died shortly after.

The devise in question was as follows:—"I also give and bequeath unto my niece, Mrs. Sarah Armstrong, the whole of the residue of my property, both freehold, and leasehold, and personal, furniture, cash, &c., for her life-time, for her own sole personal use and benefit, to the intent that neither her husband, his creditors, or any other person, shall have any control over it. But, if she should die first before her husband, Mr. Joseph Armstrong, clock-maker, 88, Deansgate, Manchester, I then give it to him for his life-time, after which all my land and houses in Boot Street, in Trent Place, and Renthall Street, in Hulme, and also my land and houses and chief or ground-rents in Regent Street, Salford, to be equally divided among the children of the above-named Joseph and Sarah Armstrong, either by the proceeds from sale of the properties or otherwise, as may be considered most advantageous at the time."

The will purported to be attested by Eliza Brunton, Thomas Armstrong, and Sarah Armstrong: of these the two last named were children of Joseph and Sarah Armstrong, and, but for the circumstance of their having attested the will, they would have taken under the devise.

A rule was obtained, pursuant to leave reserved, to set aside the verdict for the defendants and enter it for the plaintiffs for one-eighth or two eighths of the property sought to be recovered, on the ground that the devise to Thomas Armstrong and Sarah Armstrong respectively failed.

On the argument of this rule, it was admitted that Thomas Armstrong was an attesting witness within the 15th section of 7 Wm. 4 & 1 Vict. c. 26, and that he was incapable of taking under the will which he attested.

With regard to Sarah Armstrong, it was stated, and assumed as a fact, that her attestation did not comply with the requisites of s. 9 of the statute, as, although she saw the testator sign the will, she did not attest it in his presence.

For the plaintiffs it was contended that both Thomas and Sarah Armstrong, being in fact attesting witnesses to the will under

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which they claimed, were incapable of taking, by the 15th section of the statute, and that their shares (two eighths of the property) lapsed, and went to the heir-at-law.

For the defendants it was contended that, as to both their shares, the devise being to a class, and not in the will apportioned to individuals, the other children, i.e. the remaining members of the class, took the undivided shares of Thomas and Sarah, and that the heir-at-law was not entitled to them. It was further contended that Sarah Armstrong, not being an attesting witness within the meaning of the statute, was capable of taking her share, and that, at all events as to that share, the plaintiffs were not entitled.

If the decision of the Court was in favour of the defendants on the first point, the second became immaterial in this case, as the verdict for the defendants would be right.

We are of opinion on this point that the defendants are entitled to succeed, and that this rule must be discharged.

Had this been a devise to the children as joint-tenants and not as tenants in common, which the words "to be equally divided" make it, the case of *Young* v. *Davies* (1) would be directly in point. In that case it was decided by Vice-Chancellor Kindersley that, where there is a gift to a class as joint-tenants, and one of the joint-tenants is an attesting witness, though his share is forfeited by the statute, it is not undisposed of, and survives to the other joint-tenants.

This decision was not questioned by the learned counsel for the plaintiffs: but it was contended that, as this was a tenancy in common, the testator intended to give an aliquot part to each of the class, to be ascertained at his death; and that, as Thomas and Sarah were living at his decease, their shares or parts were forfeited; and that the gift was not to A., B., C., and D., as a class, but to the individuals although they constituted a class.

It becomes necessary to examine the cases and see whether the distinction between devises to a class or to individuals has relation to the nature of the tenure as indicated by the will or to the intention of the testator derived from the will.

(1) 2 Dr. & Sm. 167, 172.

In *Shaw* v. *M'Mahon* (1), a testator gave a fund accumulated from certain rents to be divided in equal parts amongst all his children living at his death, and by a codicil he revoked the gift to one of the children: it was held that the share given by the will to such child belonged to the other children, and did not devolve to the heir-at-law and next of kin of the testator. So, in *Clark* v. *Phillips* (2), where there was a revocation of portions of a residuary gift to children of certain persons and to others named in equal shares, it was held that the gift of residue was to the residuary legatees as a class (notwithstanding that some of the individuals to take were named, and a gift to one of those named and to one class of children was revoked), and that the residue went to the legatees (including another one who was named) whose bequests were not revoked.

In *Doe* v. *Sheffield* (3), the devise was of land to the sisters of J. H. (generally), their heirs, &c., as tenants in common, and not as joint-tenants; one of the three sisters, who alone survived at the time of the demise made, and who also survived the testator, was held entitled to take the whole: and it was held in that case that, even if she had been entitled to a part (whether a moiety or a third), the residue would not have gone to the heir-at-law, as in case of a lapsed devise, which supposes the deceased sisters to have been once capable of taking under the will, but to the residuary legatee of estate not before disposed of. Lord Ellenborough, in his judgment, says (4): "We may take it as the canon of this testator's intention that he regarded the objects of his bounty, as he has described them, generally, in classes:" and Bayley, J., puts the case of joint-tenants as a parallel case with reference to the point considered.

The above three cases were all cases of tenancy in common.

But, in *Creswell* v. *Cheslyn* (5), cited in the present case for the plaintiffs,—approved of in *Shaw* v. *M'Mahon* (1),—where the testator gave the residue of his personal estates to his three children, A., B., and C., share and share alike, as tenants in common, and not as joint-tenants, and by a codicil revoked C. from being

(1) 4 Dr. & W. 431.
(2) 17 Jur. 886.
(3) 13 East, 526.
(4) 13 East, at p. 533.
(5) 2 Eden, 123.

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one of his residuary legatees, and gave a pecuniary legacy instead, it was held that this third did not belong to the two others, but should go according to the Statute of Distributions. (1) Here it is to be observed that the legatees were all named, and that a money bequest was substituted for the share of one of them, tending to shew that the testator intended to apportion the shares according to their respective value.

These cases and others cited in the argument seem to us to shew that the question to be decided is not so much whether the tenancy is joint or in common,—in both of which tenures the shares are undivided,—but whether the testator intended to appropriate his bounty by giving the portion bequeathed as a whole to a class, or intended to apportion more or less by value a certain part to separate individuals. If the former were the intention, it would apply equally to joint-tenants and tenants in common.

In *Shaw* v. *M'Mahon*, Sir E. Sugden, then Lord Chancellor of Ireland, in giving judgment, says (2): "There is no doubt that modern authorities have attached more weight to the circumstance of the legatees taking as a class, when the gift to any one legatee fails, than the earlier cases did. . . . If I can discover in this instrument sufficient evidence of the testator's intention that the remaining children should take the share of the residue originally bequeathed to his second son, there is authority to give effect to that intention."

Even where the testator seemed by his will to have regard to value as remuneration for services, if the bequest is to a class, although the individuals are named in a subsequent part of the will, the same rule has been applied; as in *Knight* v. *Gould* (3), where a bequest of residue to my executors hereinafter named, to enable them to pay debts, &c., and also to recompense them for their trouble, equally between them,—one having died, the whole residue was held to vest in the survivors, as a gift to them as a class in their official character.

It was further contended that, as the class, ascertained at the time of the death of the testator, included Thomas and Sarah, it must be taken that an aliquot part of the gift was intended then

(1) 22 & 23 Car. 2, c. 10. (2) 4 Dr. & W. at p. 438.
(3) 2 M. & K. 295.

to go to them; the testator not contemplating their incapacity to take in consequence of their being attesting-witnesses.

It will be observed that, in *Doe* v. *Sheffield* (1), it is stated that the case of a lapsed devise would suppose the deceased sisters to have been once *capable* of taking under the will: and in *Young* v. *Davies* (2) Kindersley, V.C., in giving judgment, says (3): "With regard to the question upon the gift to the daughter surviving the tenant for life, who was an attesting witness to the will, I am of opinion that, though the statute avoids the gift to her, and renders her *incapable* of taking, it does not sever the joint-tenancy; it does not render the testator intestate as to the share intended for her; but the whole goes to her sisters who alone were *capable* of taking."

It would fairly seem from this that the Vice-Chancellor regarded one incapable of taking at the time of the death of the testator as not one of the class the members of which were to be ascertained at this period. We certainly are of this opinion. By the operation of the statute, the names of Thomas and Sarah (assuming the latter to be an attesting-witness, as the plaintiffs contend) are struck out of the will: they are rendered incapable of taking, and therefore in our judgment are not to be reckoned in the class ascertained at the testator's death.

The learned counsel was obliged to give up an argument that the shares vested in Thomas and Sarah, which would have placed the plaintiffs in a difficulty. We do not see how they could vest in persons incapable at the death of the testator of taking. But, where the testator leaves to a class, we do not think he can be taken to contemplate the numbers, or to have in his mind the individuals of the class who may be living at the time of his death; he gives the whole or a portion, as the case may be, of his property to a portion or division of his family, or to others who as a class form an entity and come within the terms of his devise,—a given portion to a given class.

In *Dimond* v. *Bostock* (4), a testatrix bequeathed "the residue of her personal estate to "all the nephews and nieces, in the first degree of relationship to my late husband, who were living at the

(1) 13 East, 526.
(2) 2 Dr. & Sm. 167.
(3) 2 Dr. & Sm. at p. 172.
(4) Law Rep. 10 Ch. 358.

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time of his decease." The husband left nine such surviving him; two of them died during the life-time of the testatrix, one before and one after the date of the will: and it was held that the words "living at the time of his decease" were insufficient to take the case out of the general rule that, in gifts to a class, the class must be ascertained at the death of the testator, and that accordingly the seven who survived the testatrix took the whole residue.

This case no doubt shews that the class is to be ascertained at the death of the testator; but it is a strong case to shew that, in gifts to a class, the class as a whole is to be regarded, even though such rule conflicts with the express words of the testator; some of those included in the bequest there being incapable of taking.

In the present case, the individual members of the class which takes under the will are not ascertainable at the death of the testator; for, as was observed by the counsel for the defendants, there being life-estates to the parents to take effect before the devise in question to the children, a child or children might be born after the period of the death of the testator, who would take under the devise.

Upon the whole, we are of opinion that, upon the current of authority and the reason of the decisions, so far as we can deduce it, the devise was to a class, and to such a class as would take not separate shares the value of which would vary with their number, but in undivided shares, the whole portion devised, and that this is to be taken by those who at and after the testator's death came within the limits of the class, and who were capable of taking.

This decision renders the second point, as to the attestation of Sarah Armstrong, immaterial in this ejectment, as we hold that there has been no intestacy, and that the plaintiffs are not entitled to recover for any part claimed; and therefore this rule will be discharged.

Rule discharged.

Attorneys for plaintiffs: *Field, Roscoe, Francis, & Osbaldeston, for Lowndes, Liverpool.*

Attorneys for defendants: *Milne, Riddle, & Mellor.*

LOVERING, PETITIONER; DAWSON, WALKER, AND POULTON, RESPONDENTS.

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May 24.

MAIDENHEAD MUNICIPAL ELECTION PETITION.

(No. 1.)

Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 *Vict. c.* 60), *s.* 13, *&c.—Parties to Petition—Unsuccessful Candidate not to be made a Respondent against his Will.*

At a municipal election A., B., and C. coalesced for the purpose of canvassing the burgesses. A. and B. were elected, C. was not. A petition was presented against the return of A. and B., and C. was joined as a respondent. At the trial, C., by his counsel, objected to be a respondent; but the commissioner allowed the trial to proceed upon the petition as presented, and in the result he found that A. had been guilty of personal bribery, and that B. and C. had been guilty of bribery through their agents.

Upon a special case stated for the opinion of the Court:—

Held, that C. was not properly made a respondent.

AT the last municipal election of town councillors for the town of Maidenhead there were several candidates, of whom Poulton, Dawson, and Walker were three, and these three coalesced for the purpose of canvassing the burgesses. Dawson and Walker were duly elected, but Poulton was not.

A petition was presented, under the Municipal Elections (Corrupt Practices) Act, 1872 (35 & 36 Vict. c. 60), against the return of Dawson and Walker; and Poulton was also included in that petition as a respondent.

At the trial of the petition, a preliminary objection was taken by the counsel for Poulton to that gentleman being joined with the other respondents in the petition, on the ground that the Act only contemplated a petition against those persons who were actually returned to office, and that the word "candidate" employed in the Act could not be said to apply to those who, though candidates for election, had not been returned to office; and he relied upon several sections of the Act.

The counsel for the petitioner contended that the word "candidate" extended to all persons who were candidates for election, and that, wherever the word "candidate" was used in the Act, it must be read according to the interpretation clause of the Act.

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At the trial the commissioner found that Dawson had been guilty of personal bribery, and that Walker and Poulton had been guilty of bribery through their agents.

This case was stated at the instance of Poulton's counsel, for the purpose of asking the Court to determine whether, under the Municipal Elections (Corrupt Practices) Act, 1872, the respondent Poulton was properly made a respondent in the petition.

In the event of the Court being of opinion that he was so properly joined, then he was under the order of the commissioner to pay his proportion of the costs, in common with Dawson and Walker, to the petitioner William Lovering, of and incidental to the petition. But, in the event of the Court being of opinion that Poulton was improperly joined as a respondent, then the commissioner ordered that he do receive his costs of and incidental to his defence. (1)

H. D. Greene (*J. O. Griffits* with him), for the petitioner. The 35 & 36 Vict. c. 60 professes to have been passed for two purposes,—the one, to make provision for the better prevention of corrupt practices at municipal elections,—the other, to establish a tribunal for the trial of the validity of such elections; and this double purpose is carried out by the arrangement of clauses. The first part of the Act begins with the interpretation clause, s. 2, which provides that "the following words and expressions shall respectively be construed as follows,"—Amongst others, "office" means the office of mayor, alderman, councillor, or assessor of a borough or ward of a borough; "election" means an election to an office; and "candidate" means any person elected, or *who has been nominated or has declared himself to be a candidate* for election to an office,—the same definition as is found in the Corrupt Practices Act, 17 & 18 Vict. c. 102, s. 38. The 4th section enacts that,

(1) The petition charged bribery, treating, and corrupt practices generally against the three respondents; and the prayer was "that it might be determined that the said election and return of the said Robert Walker and William Dawson was null and void, and that they were not duly elected; and that the said Robert Walker, William Dawson, and Richard Swallow Poulton were and are disqualified for being elected to and for holding any municipal office in the borough for which the said election was held, and that each of them is subject to the disqualifications in the said statute mentioned and set forth."

"where it is found in the report of an election court acting under the provisions of this Act that any corrupt practice has been committed by or with the knowledge and consent of *any candidate* at an election, such candidate shall be deemed to have been personally guilty of corrupt practices at the election; and his election, if he has been elected, shall be void, and he shall (whether he was elected or not) during seven years from the date of the report be subject to the following disqualifications,"—amongst others, "He shall be incapable of holding or exercising any municipal office or franchise, or of having his name placed on the register, or voting at any municipal election." The 5th section deals with the case of corrupt practices by agents: it enacts that, "if it is found by an election court acting under the provisions of this Act that a candidate has by an agent been guilty of any corrupt practices at an election, or that any act hereinafter in this Act declared to be an offence against this Act has been committed at an election by a candidate or by an agent for a candidate with the candidate's knowledge and consent, the *candidate shall during the period for which* he was elected to serve, or for which, *if elected, he might have served*, be disqualified for being elected to and for holding any municipal office in the borough for which the election was held, and, if he was elected, his election shall be void." The disabilities, therefore, attach to an unsuccessful candidate. If so, he may be made a respondent in a petition; for, it would be manifestly unjust that a man should be subjected to penalties and disqualifications without having had an opportunity of defending himself.

[LORD COLERIDGE, C.J. Under the old parliamentary election law, an unsuccessful candidate might be scheduled, and, though not a party to the petition, he was allowed an opportunity of answering. Sect. 43 of the Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125, corresponds with ss. 4 and 5 of this Act: and s. 45 enacts that "any person, other than a candidate, found guilty of bribery in any proceeding in which, *after notice of the charge, he has had an opportunity of being heard*, shall, during the seven years next after the time at which he is so found guilty, be incapable of being elected to and sitting in Parliament," and shall also be subject to certain other disabilities. The second division of the Act provides a mode of questioning the propriety of the election. Sect. 12

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deals only with the case of a successful candidate. Sect. 13 provides for the presentation and the form of the petition, and also for the persons who may be parties to it. An unsuccessful candidate may be a petitioner: subs. 1. By subs. 9 it is provided that "two or more candidates may be made respondents in the same petition, and their cases may be tried at the same time; but, for all the purposes of this Act, such petition shall be deemed to be a separate petition against each respondent." "Candidate" there must mean a candidate as defined by the interpretation clause, i.e. "a person elected, or who has been nominated or has declared himself a candidate for election."

GROVE, J. It is to be remembered that that is a subsection to a clause which is dealing with "a petition complaining of an undue *election*."]

In *Yates* v. *Leach* (1), this Court held that Leach, although not returned as a town-councillor, might still properly be made a respondent.

[LORD COLERIDGE, C.J. He was de facto in the office, and he would neither resign nor disclaim, and therefore we held that it did not lie in his mouth to say that he was not elected.]

Under subsections 4 and 5 of s. 15, the certificate and report of the commissioner as to corrupt practices might include corrupt practices by an unsuccessful candidate. As to the effect of the report, see *Drinkwater* v. *Deakin*. (2) There could be no hardship in making such a person a respondent; whereas, great hardship would be inflicted upon him as well as upon the petitioner if he might not be joined; for, if not a party to the petition, he would have no opportunity of defending himself against any charge of corrupt practices which may be brought against him, subs. 3 of s. 13 only applying to parties and witnesses; and the petitioner would have no remedy against him for his costs. Besides, he is not obliged to defend, though made a respondent: he may withdraw, under the provisions of s. 18. The form of petition given in Rule 5 of M. T. 1868, is not conclusive: one "to the like effect" may be adopted. Poulton having coalesced with the other respondents in canvassing the burgesses, his interest and his liabilities became identical with theirs.

(1) Law Rep. 9 C. P. 605. (2) Law Rep. 9 C. P. 626.

[The following cases as to parliamentary elections were referred to for the purpose of shewing that unsuccessful candidates might be included: *The Maldon Case* (1); *The Beverley Case* (2); *The Beverley (second) Case* (3); *The Hackney Case.* (4)]

[LORD COLERIDGE, C.J. In *The Maldon Case* (1), the original petition having been withdrawn, the recriminatory petition was not allowed to proceed, because it did not affect the election.]

Biron, for the respondent Poulton.

[GROVE, J. The only point upon which I entertain any doubt is this. The Parliamentary Act, 1868, 31 & 32 Vict. c. 125, s. 11, subs. 14, enacts that, where any charge is made in an election petition of any corrupt practice having been committed at the election to which the petition refers, the judge shall, in addition to the certificate which he is to give under the preceding subsection, and at the same time, report in writing to the speaker,—"whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at such election, and the nature of such corrupt practice,"—and "The names of all persons (if any) who have been proved at the trial to have been guilty of any corrupt practice." That report would not disqualify (under s. 45) any person "other than a candidate," unless he had notice of the charge to be made against him and an opportunity of being heard. The provision in subs. 5, s. 15, of the Corrupt Practices (Municipal Elections) Act, 1872, is very nearly the same. The parties reported against are not disqualified by the report unless they are candidates. But, if unsuccessful candidates are reported against under ss. 4 and 5 of that Act, there is no provision that they shall have notice, and consequently they may be subjected to penalties and disqualifications without having an opportunity of defending themselves.

BRETT, J. I do not feel pressed by the difficulty suggested by my Brother Grove, because I think every Act of Parliament is to be read with a reasonable intendment. It is manifestly contrary to the first principles of justice that a man should have disabilities imposed upon him without full notice and opportunity to defend himself.]

(1) 2 P. R. & D. 143.
(2) W. & D. 214.
(3) W. & Br. 77.
(4) 2 O'M. & H. 77.

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It will be remembered that Part I. of the Act of 1872 is dealing with corrupt practices at elections. Sections 1 to 11 are all fresh legislation. Amongst these is s. 5, which provides that, "if it is found by an election court acting under the provisions of this Act that a candidate has by an agent been guilty of any corrupt practice at an election, or that any act hereinafter in this Act declared to be an offence against this Act has been committed at an election by a candidate, or by an agent for a candidate with the candidate's knowledge and consent, the candidate shall, during the period for which he was elected to serve, or for which if elected he might have served, be disqualified for being elected to and for holding any municipal office in the borough for which the election was held, and, if he was elected, his election shall be void." It would not be right to read that section as if it were drawn to meet every conceivable case that may arise. The obvious solution is that it applies to persons who are *necessarily* parties to the petition,—to candidates who are elected, and to unsuccessful candidates who have petitioned and prayed the seat. The whole must be read in conjunction with subs. 9 of s. 15. It is impossible to give any sensible construction to the provisions of s. 13 without holding them to be limited to a candidate whose election is petitioned against.

Greene was heard in reply.

LORD COLERIDGE, C.J. I am of opinion that our judgment in this case should be for the respondent. This is a municipal election petition for the borough of Maidenhead. The petition was against three persons who had been candidates at the election, two only having been elected, the third having coalesced and canvassed with them, but not having succeeded. No question arises as to Dawson and Walker, who were properly found guilty of bribery. The only question is as to Poulton, who objected at the trial before the barrister appointed to try the petition that he had no seat to defend, and ought not to have been joined as a respondent. The barrister, however, allowed the case to go on in the form in which it was presented to him, and has stated the facts in a special case, reserving to us the question whether, under the Municipal Elections (Corrupt Practices) Act, 1872, Poulton was

properly made a respondent in the petition: and he goes on to direct that, in the event of the Court being of opinion that he was so properly joined, then he was to pay to the petitioner his proportion of the costs of and incidental to the petition, in common with Dawson and Walker; but that, in the event of the Court being of opinion that Poulton was improperly joined as a respondent, he was to receive his costs of and incidental to his defence. The whole question arises upon the words of the statute. I am of opinion that Poulton could not properly be so joined. If the question now before us had been exactly the converse of that which we decided in the *Oldham Case, Yates* v. *Leach* (1), it may be that our decision would be different. If Poulton had come forward to claim a seat,—if he had insisted upon making himself a respondent,—it may be that we should have held that he had taken upon himself all the liabilities which attach to a respondent. But it by no means follows that the converse of the proposition is true,—that, without any act or consent on his part, and against his will, a man can be made a respondent, so that the petitioner may gain rights against him. The Act of Parliament upon which this question turns has been very elaborately argued before us; every provision that could throw any light, however remotely, upon it has been brought to our notice and carefully considered. The second part of the Act, which deals with election petitions, commences at s. 12, which enacts that "the election of any person at an election for a borough or ward may be questioned by petition before an election court constituted as hereinafter in this Act provided, and hereinafter in this Act referred to as the 'court,' on the ground that the election was as to the borough or ward wholly avoided by general bribery, treating, undue influence, or personation, or on the ground that the election of such person was avoided by corrupt practices or offences against this Act committed on the election, or on the ground that he was at the time of the election disqualified for election to the office for which the election was held, or on the ground that he was not duly elected by a majority of lawful votes." Sect. 13 enacts a sort of procedure,—"The following provisions shall have effect with reference to the presentation of a petition complaining of an undue election." When the section

(1) Law Rep. 9 C. P. 605.

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speaks of a petition complaining of an undue election, it manifestly did not contemplate making any person a respondent except a person petitioned against. It begins by setting out who may present a petition, and states that the petition shall be in the prescribed form. The prescribed form (1) does not contemplate making any one a respondent except with reference to the due or undue return of the party petitioned against. The section then goes on, "The terms 'petitioner' and 'respondent,' as hereinafter used in this Act include respectively any one or more persons by whom a petition is presented, and any one or more persons *against whose election* a petition is presented." Poulton is not a person against whose election this petition was presented. In the *Oldham Case* the respondent assumed to have been elected; he could not afterwards be heard to say that he was not properly made a respondent. This is a totally different case. Other portions of the Act are equally clear. Subs. 9 of s. 13, which provides that "two or more candidates may be made respondents to the same petition, and their cases may be tried at the same time, but for all the purposes of this Act such petition shall be deemed to be a separate petition against each respondent," confirms the argument arising from the earlier provisions. It is plain, as it seems to me, that, when they are made respondents, it must mean in a petition complaining of the undue election of the persons against whom the petition is presented. There are other provisions in the Act which look the same way. Taking the whole of s. 13 together, I am of opinion that it is only a person whose seat is sought or whose election is disputed that can be made a respondent,—apart, of course, from the returning officer: s. 13, subs. 6.

The two arguments which were mainly pressed upon us, and which are fair matters for consideration, are,—first, that derived from the interpretation clause,—secondly, that which is founded on the question of costs. The interpretation clause declares that "*candidate* means a person elected, or who has been nominated or has declared himself a candidate for election to an office." No doubt, Poulton was a "candidate" within that clause. But it must be remembered that the interpretation clause begins with these words, "In this Act, *except where the context otherwise re-*

(1) See Rule 3 of Michaelmas Term, 1868.

quires, the following words and expressions shall respectively be construed as follows." And here it appears to me that the context does "otherwise require."

The argument derived from a consideration of the costs is a more plausible one. It is urged that, if an unsuccessful candidate is accused before the commissioner of corrupt practices at the election, he may by the finding of the commissioner be disqualified for being elected to and for holding any municipal office in the borough for the remainder of the year, and that without having an opportunity of being heard in his defence,—ss. 4, 5,—or, if he is allowed to appear and defend himself without being made a party to the petition, he has no means of recovering the costs he may be put to if successful. That is true: but the answer to the argument is, that, in all election matters, whether parliamentary or municipal, it is impossible that the subject can be approached without some private and particular injustice to individuals. Thus, when a borough is disfranchised for general corruption, a certain amount of personal injustice is unavoidably inflicted upon the number, whether large or small, of unoffending electors. The object of the inquiry is one of great general interest to the whole community: it is to prevent corrupt practices, and to punish them where they are found to exist; and if, in the prosecution of a great good, the private interests of individuals suffer, it is to be lamented, but cannot be avoided. Having these objects in view, the legislature has enacted these salutary provisions. Whether they are too severe or not, there they stand, and we must give effect to them. The first answer, therefore, which I give to this part of the argument is, that private interests must bend to the public good. The second answer I give is, that, under the Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125, injustice does frequently arise by direct enactment to persons who may find themselves disqualified without any fault of their own, and without their having any opportunity of being heard, or, if heard, being incapable of recovering the costs of their defence against any one. The objection urged here, that the party who successfully defends himself against a charge of corrupt practices can claim no costs if he is not made a respondent, would equally arise under the Act of 1868. It is true that, under

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s. 45 of that Act, before a party can be disqualified for bribery, he must have notice of the charge and an opportunity of being heard, —a provision which is not found in this Act: and this, I believe, has given rise to some hesitation in the mind of my Brother Grove. Speaking for myself alone, I am of opinion that the suggestion which I threw out during the argument, founded upon ss. 43 and 44, is the correct one. But I am clearly of opinion that the answer given by my Brother Brett is the true one, viz. that we cannot construe this Act without reference to the obvious and first principle of natural justice, that no man shall be condemned without having notice of the charge against him and an opportunity of being heard in his defence. (1) For these reasons, I do not think the Act of 1868 has any material bearing on the questions before us, and I come to the conclusion that judgment should be for the respondent.

BRETT, J. This case has been argued by Mr. Greene with very great ability. The petitioner by his own act made Poulton a respondent. At the trial before the commissioner the case took this shape. It was said that Poulton and the two other respondents coalesced for the purpose of canvassing the burgesses, and therefore any unlawful act of Poulton would invalidate the election and return of the other two candidates. The case proceeded, and in the result the commissioner found that Poulton had been guilty of bribery by his agents. Now, we are not asked to say whether the commissioner had jurisdiction to enter upon that inquiry; nor are we asked to decide whether the conduct of a person who is not a respondent may be inquired into upon the

(1) See *Dr. Bentley's Case*, *Rex* v. *The Chancellor, &c., of Cambridge* (8 Mod. 148; 2 Ld. Raym. 1334; Fort. 202, where Fortescue, J., says (8 Mod. 164): "It must be granted that convictions, even upon Acts of Parliament, are frequently quashed for not summoning the persons convicted, though not required by the statute, because it is still against natural justice to convict without hearing. The want of a summons is an objection that can never be got over. Had the custom been returned, to deprive without summons, it had been void, as against natural justice. If a justice of peace convict any man without a summons, such conviction is void. I heard a learned civilian say that God himself would not condemn Adam for his transgression until he had called him to know what he could say in his defence." Gen. iii. 9.

trial of a petition; nor are we asked to decide whether, if it be competent to the commissioner to enter into such an inquiry, the person whose conduct is impeached ought to have notice and an opportunity of being heard: nor are we asked to determine whether the objection was taken at the right time: neither are we asked to say whether the petitioner is to recover his costs against Poulton in one event, or whether Poulton is to recover costs against the petitioner in the other. All that we are asked to decide is, whether Poulton was properly made a respondent in the petition. Now, one thing is clear, viz. that this election tribunal can have no jurisdiction, powers, or duties other than those which are given to it by the Act of Parliament under which it is created. This is not a common law procedure, but a procedure given by statute; and it is only in the statute that we are to look to see who are to be parties to it. The solution of that question seems to me to turn entirely on the construction to be put upon s. 13. That section declares who may petition, in what form the petition shall be, to whom and within what time it shall be presented, and against whom. It may be presented by four or more voters or by an unsuccessful candidate. It must be in the prescribed form, presented in the prescribed manner, and published by the town-clerk of the borough. Then comes the material part, which states who may be made a respondent,—"The terms 'petitioner' and 'respondent,' as hereinafter used in this Act, include respectively any one or more persons by whom a petition is presented, and any one or more persons against whose election a petition is presented." It is only a person who is petitioned against who can be made a respondent. Poulton is not such a person. Then, turning from the section to the rules, there is nothing in any of them, or in the form of petition given, to enlarge that definition. The governing part is that which I have read. It is urged that by so construing s. 13, we give no effect to s. 5, as enlarged by the interpretation clause, s. 2. But it seems to me that the words of s. 5 are satisfied by applying them to an unsuccessful candidate being a petitioner. Then it is said that grave charges might be made against an unsuccessful candidate, and, unless he could be made a respondent, an adverse decision might be given against him, which might be followed by serious consequences, without his having had an oppor-

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tunity of defending himself, and possibly without his having any notice of the charges to be made against him. I am far from saying that, in an inquiry between a petitioner and a respondent, the investigation might not involve a charge against a third person, and that without such third person having notice or an opportunity of being heard in his defence: and, further, I admit that there are no words in this Act or in the rules which would seem specifically to require notice to be given to such third person, even though his conduct at the election should become the subject of inquiry. But I do not assent to the suggestion that any *disability* could be imposed upon him upon the result of such inquiry, without giving him an opportunity of defending himself; for, though there are no words in this Act, as there are in the Parliamentary Elections Act, 1868, expressly providing for notice to be given in such a case, I take it to be contrary to the first principles of English jurisprudence and English law that a man should be condemned unheard. I should hold, therefore, that, by necessary implication, no decision of a tribunal created by this Act would bind a third person, unless he had notice of the proceedings affecting him, and full opportunity of being heard. Another argument which has been strongly pressed upon us is, that, if the conduct of an unsuccessful candidate may be brought in question upon the trial of a petition, unless he could either be a petitioner or a respondent he would have to fight the matter at the disadvantage of being unable to obtain his costs if he succeeded in establishing his innocence. I must admit that that is so: one who is not a party to a proceeding in a Court of law in general cannot be made liable for costs, neither can he recover them. No doubt, that may be a hardship: but I agree with my Lord that, the policy of the Act of Parliament being to put an end to corrupt practices at elections, it would be almost impossible to attain the end in view without imposing hardships somewhere; and individual interests must always give way to the general good. In the present case, the petitioner having chosen to make Poulton a respondent, I think the latter might have had his costs if he had succeeded at the trial. But, however that may be, we cannot escape from the plain words of the Act. I am inclined to think that the petitioner could not by his own act of making Poulton a

respondent entitle himself to costs as against him. I think Poulton's name ought to have been struck out by some tribunal. I agree with my Lord that there must be judgment for this respondent.

GROVE, J. I agree with the rest of the Court that our judgment should be in favour of Mr. Poulton. I think the 12th and 13th sections of 35 & 36 Vict. c. 60 are too strong to be got over. The 12th section enacts that the election of any person at an election for a borough or ward may be questioned by petition before an election court, on the ground that the election was wholly avoided by general bribery, treating, undue influence, or personation, or on the ground that the election of such person was avoided by corrupt practices or offences against the Act, or on the ground of disqualification, or on the ground that he was not duly elected. Now, the object of a petition is to question the *return*. The 13th section provides for the presentation of a petition complaining of an undue election; it prescribes the person by whom and the form in which the petition shall be presented; and then it enacts that the terms "petitioner" and "respondent" shall include one or more persons by whom a petition is presented, and any one or more persons against whose election a petition is presented. The object of the petition is not to petition against misconduct, such as bribery or treating, &c., but against the return of the person guilty of such misconduct. The "respondent," except in the case provided for by subs. 6, is the person against whose return the petition is presented. Subs. 9 means no more than this, that, where there are two or more candidates whose election is objected to, the complaint against all may be included in one petition. Sect. 5 affords an argument in Mr. Green's favour, but not strong enough to overcome ss. 12 and 13. The main difficulty which has struck me,—but which is not sufficient to alter what is to me the apparent meaning of the Act,—is, that I do not find in this Act anything equivalent to s. 45 of the Parliamentary Elections Act, 1868, which provides that any person other than a candidate found guilty of bribery in any proceeding in which, after notice of the charge, he has had an opportunity of being heard, shall, if found guilty, be subjected to certain disabilities. It may be, as my Lord has suggested, that we must imply that

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which natural justice dictates; but I cannot help observing that it is a somewhat dangerous practice for a Court to incorporate into an Act of Parliament language which is not found there, because it may conceive the principles of natural justice to require it. I observe that by s. 11, subs. 14, of the Act of 1868, the election judge is to make a report to the Speaker as to whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate, and the nature of such corrupt practice,—the names of all persons who have been proved at the trial to have been guilty of any corrupt practice,—and whether corrupt practices have extensively prevailed at the election. That report does not ipso facto disqualify the persons who are named therein, but only if at that trial or on any subsequent proceeding of which they have had notice and in which they have had an opportunity of being heard, they are found to have been guilty of the practices referred to. But by the Act of 1872, the disqualification attaches upon the report itself; s. 4: and, so far as candidates are concerned, unsuccessful candidates who are no parties to the petition would be disqualified by the report itself. So that, while the report of the commissioner under this Act is almost exactly analogous to the report of the election judge under the Act of 1868,—see s. 15, subs. 5 of the Act of 1872,—the one works an ipso facto disqualification, the other only where the party has had an opportunity of being heard. That, as it strikes me, is very unsatisfactory. I find nothing in this Act, or in the rules made under it, to guard against this injustice; but, though this affords a fair argument in favour of Mr. Greene's contention, it is not to my mind strong enough to override the other provisions of the Act to which I have referred. I therefore agree with the rest of the Court that the term "respondent," with the one exception mentioned in subs. 6 of s. 13, viz. the case of the returning officer, is limited to a person who has been or who has assumed to have been elected.

LINDLEY, J. I am of the same opinion. I think the conclusion at which my Lord and my two learned Brothers have arrived is right for three reasons. The object of the legislature is defined by s. 12. It is plain from that and from the form of the petition given in the rules, that the questions to be tried are,

whether the election has been avoided by corrupt practices, and whether the person or persons elected was or were disqualified or not duly elected. Who, then, upon principle, should be a respondent in a petition having that object? Clearly only the person who claims to be seated; and it lies upon those who would enlarge the class to shew that others ought to be included in it. Reliance has been placed upon subs. 9 of s. 13 for that purpose,—"Two or more *candidates* may be made respondents to the same petition, and their cases may be tried at the same time; but, for all the purposes of this Act, such petition shall be deemed to be a separate petition against each respondent." Now, I fail to see how there could have been a separate petition against Mr. Poulton here, having regard to the language of s. 12 and that of the other subsections of s. 13, and particularly to the form of the petition. And, when we look at s. 15, subs. 5, which imposes upon the commissioner the duty of making a report to the superior Court of any corrupt practices, and "the names of all persons who have been proved at the trial to have been guilty of any corrupt practice or offence under the Act," unless every person whose conduct may be reported upon may be made respondent in a petition, I do not see why an unsuccessful candidate should be made a respondent more than the others. Notwithstanding the provision in s. 5, it appears to me not to be reasonable that a man whose election is not in question should be a respondent in a petition questioning the validity of an election. Whatever disabilities an unsuccessful candidate may incur by corrupt practices at the election, these can hardly entail any penal consequences upon him without his having had an opportunity of defending himself. For these reasons, it appears to me that the only proper persons to be made respondents on a petition under this Act are those whose election and return are objected to, and consequently that Poulton was not properly made a respondent.

Judgment for the respondent. (1)

Agents for petitioner: *Dangerfield & Blythe, for Rawson, Marlow.*

Agents for respondents: *Nickinson, Prall, & Nickinson, for Charles Brown, Maidenhead.*

(1) As to costs, see the next case.

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June 12.

LOVERING, PETITIONER; DAWSON AND OTHERS, RESPONDENTS.
MAIDENHEAD MUNICIPAL ELECTION PETITION.

(No. 2.)

Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 *Vict. c.* 60), *s.* 19, *subs.* 1—*Costs of Petition.*

The costs of and incidental to a petition under the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), are in the sole and absolute discretion of the commissioner who tries the petition; and his decision cannot be reviewed by the superior Court, how flagrantly wrong soever it may be.

P., an unsuccessful candidate at a municipal election, having been joined as a respondent in a petition against the return of the successful candidates, a case was stated for the opinion of this Court as to whether or not he had been properly made a respondent; and the commissioner ordered that, in the event of the Court being of opinion that he was improperly so joined, P. was to receive his costs from the petitioner. The Court having decided in favour of P.:—

Held, that, having made him a respondent, it was not competent to the petitioner to say that P. was not properly "a party to the petition," and therefore not entitled to costs.

THE order as to costs which was indorsed by the commissioner upon the petition, and which was dated the 11th of March, 1875, was as follows:—

"I order that all the costs, charges, and expenses of and incidental to the preparation of the within petition and the proceedings thereunder and consequent thereupon, shall, in the event of the Court of Common Pleas being of opinion that the respondent Poulton was properly joined with the other respondents in the within petition, be paid by each and all the said respondents in equal and individual shares: but that, should the Court of Common Pleas be of opinion that the respondent Poulton was improperly joined with the other respondents in the said petition, I order that the respondents Dawson and Walker do pay their said equal and individual shares of the costs and expenses of the said petition, and that the petitioner do pay to the respondent Poulton the costs, charges, and expenses incurred by him in and about the defence of the said petition."

After the election for town-councillors for the borough of Maidenhead, in which Dawson, Walker, and Poulton were candidates, and at which the two former were elected, there was an election for alderman for the same borough, at which Poulton was

the successful candidate. Together with the petition against the return of Dawson and Walker as town-councillors, in which petition Poulton had been improperly joined as a respondent, there was filed a petition against the return of Poulton as alderman, at the suit of one Nicholson.

On the 22nd of February, 1875, a summons was taken out at chambers, under which an agreement was come to and embodied in a judge's order, that the petition in *Nicholson* v. *Poulton* should abide the result of the petition against the respondents in the case of *Lovering* v. *Walker and Others*, and that in the meantime all further proceedings in the matter of that petition (*Nicholson* v. *Poulton*) be stayed.

After the trial of the first petition, the commissioner indorsed upon the petition in *Nicholson* v. *Poulton* the following order:— "I do order that the respondent herein is not duly elected, and I do order the said respondent to pay the costs of the said herein petitioner."

The result of the decision of this Court upon the case stated under the first petition, and the order of the commissioner indorsed thereon, being to entitle Poulton to his costs,

H. D. Greene, on behalf of the petitioner, obtained a rule calling upon Poulton to shew cause why the certificate of the commissioner dated the 11th of March, 1875, which directed the payment to him of the costs, charges, and expenses incurred by him in and about his defence to the said petition, should not be varied or discharged.

Biron shewed cause. The order of the commissioner was, that, if this Court should be of opinion that Poulton was improperly joined with the other respondents in the petition, the petitioner should pay him the costs incurred by him in and about his defence to the petition. This Court did decide that Poulton was improperly joined, and therefore under that certificate he is entitled to his costs, and this Court has no power to deprive him of his right. Subs. 1 of s. 19 of 35 & 36 Vict. c. 60 enacts that "all costs, charges, and expenses of and incidental to the presentation of a petition, and to the proceedings consequent thereon, with the exception of such costs, charges, and expenses as are by this Act otherwise provided for, shall be defrayed by the parties to the

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petition in such manner and in such proportions as the court by which the petition is tried may determine; and, in particular, any costs, charges, or expenses which in the opinion of the court by which the petition is tried have been caused by vexatious conduct, unfounded allegations, or unfounded objections on the part either of the petitioner or the respondent, and any needless expense incurred or caused on the part of petitioner or respondent may be ordered to be defrayed by the parties by whom it has been incurred or caused, whether such parties are or are not on the whole successful." The costs being thus placed at the sole and absolute discretion of the tribunal before which the petition is tried, this Court has no power to question its exercise. The recognizance entered into pursuant to s. 13, subs. 5, is given for the benefit of the *respondent;* and it will now be said that Poulton, not being properly a respondent within the Act, can derive no benefit from it. But, upon the authority of the *Oldham Case, Yates* v. *Leach* (1), it does not lie in the mouth of the petitioner, who has chosen to make him a respondent, now to say that he is not entitled to costs as a respondent.

[LORD COLERIDGE, C.J. The difficulty I feel is that by the order which the commissioner has made the successful party here is saddled with the costs of the unsuccessful party. I have no hesitation in saying that, if I had power to review the certificate, I should do so at once.]

H. D. Greene, in support of the rule. Sect. 19, subs. 1, contemplates two parties to the petition,—the petitioner and the respondent. But the Act also contemplates that costs may be payable to others besides those who are parties to the petition,—witnesses, for instance. Poulton being no party to this petition, the commissioner had no jurisdiction to give him costs, though possibly he might have been entitled to be paid out of the deposit or by enforcing the recognizance. Sect. 21, subs. 5, provides that "the superior Court shall, subject to the provisions of this Act, have the same powers, jurisdiction, and authority with reference to an election petition and the proceedings thereon as it would have if the petition were an ordinary cause within its jurisdiction." The decision of the commissioner as to costs is therefore subject to

(1) Law Rep. 9 C. P. 605.

review by the superior Court. The difficulty has arisen here from the commissioner having anticipated the time for giving his certificate as to costs. He should have waited until the determination of this Court upon the special case had been pronounced, and then no doubt justice would have been done. (1) The Court may still remit the matter to him.

LORD COLERIDGE, C.J. I am of opinion that this rule should be discharged. I arrive at this conclusion with great regret, because, knowing all the circumstances, I feel that the result to which I alluded in the course of the argument must necessarily follow, viz. that the person who has been unseated by reason of bribery by an agent will by the judgment of the commissioner who tried the petition, get the costs of his unsuccessful defence out of the pocket of his successful opponent,—a result which is much to be lamented. If this Court had jurisdiction to review the commissioner's decision as to costs, I should not have hesitated for a moment to exercise it here. But I am of opinion that we have no such jurisdiction. The only provision in 35 & 36 Vict. c. 60, as to costs, is contained in s. 19, subs. 1,—"All costs, charges, and expenses of and incidental to the presentation of a petition, and to the proceedings consequent thereon," "shall be defrayed by the parties to the petition in such manner and in such proportions as the court by which the petition is tried may determine." That gives an absolute and uncontrolled discretion to the commissioner who tries the petition to say how the costs of and incidental to the petition shall be defrayed by the parties thereto, and the proportion, if there be more than one petitioner or respondent, in which such costs shall be defrayed by them. The circumstances here were somewhat peculiar. Poulton was joined as a respondent with Dawson and Walker in what may be called a town-councillor petition, and he was sole respondent in what may be called an alderman petition; and it is admitted that he coalesced for the purpose of canvassing the burgesses with his co-respondents in the first petition, so that each of them became in law agent for the others, and consequently an act of bribery proved against one would taint the election as against the other

(1) See s. 15, subs. 5.

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two. The evidence, therefore, which disqualified Dawson and Walker on the trial of the first petition, would also disqualify Poulton under the second. Upon the special case submitted to this Court upon the first petition, we held that Poulton was improperly made a respondent thereto. Unfortunately, the commissioner who submitted to us the question of whether or not Poulton was properly made a respondent, prematurely arrived at a decision as to the costs; for, he indorsed upon the petition and inserted in the case a conditional order, which so far as concerns the present rule was in these terms,—"Should the Court of Common Pleas be of opinion that the respondent Poulton was improperly joined with the other respondents in the said petition, I order that the petitioner do pay to the respondent Poulton the costs, charges, and expenses incurred by him in and about the defence of the said petition." Operating upon our decision, that indorsement became an absolute order for payment of Poulton's costs by the petitioner. Whether or not the commissioner was aware of the judge's order of the 22nd of February, 1875, or intended his order as to costs to have the effect it has, we need not inquire. (1) It is enough for us to know that he has made the order, and that, if he had jurisdiction to make it, we cannot interfere. The only argument urged before us on behalf of the petitioner upon s. 19, subs. 1, was, that that subsection provides that the costs shall be defrayed by and apportioned amongst "the parties to the petition," and that, inasmuch as we have held that Poulton was not properly a party to the petition, no costs could be awarded to him under it, and therefore the order in question was without jurisdiction. I am, however, of a different opinion, because, although we held, upon the argument of the special case, that Poulton was improperly made a respondent, yet,

(1) At this time the rule of Hilary Term, 1875, which provides that "a copy of every order (other than an order giving further time for delivering particulars, or for costs only), or, if the master shall so direct, the order itself or a duplicate thereof, also a copy of every particular delivered, shall be forthwith filed with the master, and the same shall be produced at the trial by the registrar, stamped with the official seal," had not been made: consequently, the commissioner had not necessarily before him the order of Lush, J., which directed that the decision of the second petition should abide the result of the first.

as the petitioner thought fit to bring him before the Court and compel him to defend himself, and to incur expense, he cannot be heard to say that Poulton was not in fact a party to the petition, and that the commissioner had no jurisdiction to deal with him. Being of opinion, therefore, that the commissioner had jurisdiction, I am further of opinion that we have no power to review it or in any way to call it in question. The only other part of the Act upon which reliance was placed, is subs. 5 of s. 21, which, it is suggested, gives this Court the same powers and jurisdiction with reference to an election petition as if it were an ordinary cause: and it is said that the commissioner is to be looked upon as if he were a judge sitting at nisi prius, and this an appeal from an order made by him. But, in the first place, it is difficult to see how any order of a judge at nisi prius could be brought under review in this way: and, in the second place, if a judge at nisi prius were to exercise a discretion in a matter coming before him, I do not see how the Court is to review it. But there is another and a better answer to that argument: subs. 5 of s. 21 is subject to a limitation,—"The superior Court shall, subject to the provisions of this Act, have the same powers," &c. I am clearly of opinion that the Act of Parliament makes the commissioner the conclusive judge of the matter, and that we have no jurisdiction over his order.

BRETT, J. In this case Lovering petitioned, under 35 & 36 Vict. c. 60, against the return of Dawson and Walker at an election of town-councillors for the borough of Maidenhead, and made Poulton (who was an unsuccessful candidate) a respondent. Poulton at the trial by his counsel objected to being made a party to that petition; and nobody seems to have suggested any doubt that it was competent to the commissioner to determine whether or not Poulton ought to have been made a respondent. The matter was not much argued before him; but the commissioner came to the conclusion that Poulton was properly made a respondent, and he referred the question to this Court under s. 15, subs. 5. The Court acted as having jurisdiction to hear the matter so referred to them; and accordingly we heard the case argued, and we determined that Poulton was not properly made a respondent in that petition. In stating the special case for our

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opinion, the commissioner decided also the question of costs, which, however, was not referred to us. It is now said that the commissioner had no jurisdiction to award costs to Poulton, because he was not properly a respondent. I must confess it seems to me to be a monstrous conclusion to say that he had no jurisdiction to give Poulton costs, because he had been improperly brought before the Court, when the petitioner himself was the party who compelled him to appear and defend himself. I think he is clearly estopped from that objection. This question becomes somewhat complicated here, by reason of there having been a second petition against Poulton alone in regard to his own return as alderman, which petition by an order of my Brother Lush at chambers was made to abide the result of the former petition. The order of the commissioner, therefore, involves something far more important than the costs incurred by the improperly joining Poulton as a respondent in the first petition, because Poulton on that petition fought for several days the very question which he would have had to fight under the petition to which he was the sole respondent. If that contest had taken place under the second petition, Poulton would have had to pay the costs, he having been unseated for bribery. I must confess I do not understand upon what principle the commissioner gave him the costs of defending himself against a petition upon which he failed. The proper course would have been to have given him the costs occasioned by his having been improperly made a respondent in the first petition, but not the costs of rebutting the evidence which under the second petition deprived him of his alderman's gown. If, however, the commissioner had jurisdiction, he has an absolute discretionary power over the costs; and the Act of Parliament has given us no jurisdiction to review it. Subs. 5 of s. 21 does not take away the discretion vested in the commissioner under s. 19, subs. 1. I agree therefore with my Lord that, if we had power to do so, we should reverse his decision; but, as we have no such power, we have no alternative, and must discharge this rule.

Rule discharged.

Agents for petitioner: *Dangerfield & Blythe, for Rawson, Marlow.*

Agents for respondents: *Nickinson, Prall, & Nickinson, for Charles Brown, Maidenhead.*

WOODWARD, PETITIONER; SARSONS AND SADLER, RESPONDENTS.
BIRMINGHAM MUNICIPAL ELECTION.

1875
July 9.

Municipal Election—Where avoided at Common Law or under the Ballot Act (35 & 36 Vict. c. 33), s. 13, by Non-compliance with the Rules and Forms prescribed—Costs of Petition.

An election is to be declared void by the common law applicable to parliamentary elections, if it has been so conducted that the tribunal which is asked to avoid it is satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws,—that is, that the constituency have not in fact had a fair and free opportunity of electing the candidate which the majority might prefer, or that there is reasonable ground to believe that a majority of the electors may, by reason of irregularities in the mode of conducting the election, have been prevented from electing the candidate they preferred.

To render an election void under the Ballot Act, by reason of a non-observance of or non-compliance with the rules or forms given therein, such non-observance or non-compliance must be so great as to satisfy the tribunal before which the validity of the election is contested that the election has been conducted in a manner contrary to the principle of an election by ballot, and that the irregularities complained of did affect or might have affected the result of the election.

The ballot paper must not be marked so as to shew that the voter intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all or for which candidate he intended to vote, nor so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted.

If these requirements are not substantially fulfilled, the ballot paper is void and should not be counted; and, if it is counted, it should be struck out on a scrutiny.

Ballot papers with the name of the voter or of the candidate voted for written opposite to the name of the latter and not marked with a cross, or with the addition of "*cu*" to the cross were held to be void.

But the placing of two crosses, or three crosses, or a single stroke (thus /) in lieu of a cross, or a straight line (thus |) or a mark like an imperfect letter P in addition to the cross, or a star instead of a cross, or a cross blurred or marked with a tremulous hand, or a cross placed on the left hand side of the ballot paper, or a pencil line drawn through the name of the candidate not voted for, or a ballot paper torn longitudinally through the centre,—

Held, not to avoid the vote, in the absence of evidence of connivance or prearrangement.

Twenty ballot papers were marked by the presiding officer by the direction of voters who were unable to read. Each of these ballot papers was placed by the presiding officer in the ballot box wrapped up in the declaration of inability to read made by the voter. The declarations of inability to read of the votes so marked by the presiding officer were not made up into a separate packet, sealed

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with the seal of the presiding officer, and so delivered to the returning officer (pursuant to sched. 1, Part 1, rules 26 and 29), but were delivered to him in the ballot box with the ballot papers as above mentioned. These votes could have been, but were not in fact, identified by the returning officer at the counting of the votes:—

Held, that, notwithstanding this breach by the presiding officer of the directions in the rules, the votes in question were properly counted.

At one of the polling stations the presiding officer before delivering the ballot papers to the electors attending to vote marked upon each (to the extent of 294) the number of the voter appearing on the burgess-roll,—which would enable any of the persons present at the counting of the votes to identify the way in which the party had voted. Of the electors who received these ballot papers, 234 voted for the petitioner, and 60 for the respondent. These votes were not counted by the returning officer:—

Held, that this admitted error of the presiding officer,—which did not affect the result,—did not render the election void either at common law or under the Ballot Act.

Where there have been irregularities in the conduct of an election by the presiding officer at a particular polling station, but there has been no personal default on the part of the returning officer, and the result of the election has not been affected by the mistake of the presiding officer, the returning officer will not be visited with costs.

CASE stated by order of Lush, J., under the provisions of s. 15, subs. 6, of the Corrupt Practices (Municipal Elections) Act, 1872, 35 & 36 Vict. c. 60:—

1. An election for the office of town-councillor for the Nechell's Ward of the borough of Birmingham was held on the 2nd of November, 1874, to supply a vacancy in the council.

2. For the purposes of municipal elections, Nechell's Ward is divided into nine polling districts, respectively numbered 123, 124, 125, 126, 127, 128, 129, 130, and 131. In each of these polling districts there is a polling-station, where the votes of the burgesses appearing on the ward list rated in that district are taken.

3. Upon the ward list in force at the time of the said election for Nechell's Ward there were 4405 voters; and upon the list for polling district No. 130 (which is the largest of the nine polling-districts) there were 564 voters.

4. At the said election, the petitioner, Lewis Woodward, and the respondent Henry Sarsons, were the only candidates; and the respondent John Sadler (who is the alderman of the ward) was the returning officer.

5. A poll having become necessary, the same was held; and at

its conclusion the returinng officer, John Sadler, declared that the number of votes given for each of the candidates was as follows:— For Henry Sarsons, 965 votes; for Lewis Woodward, 775 votes: and thereupon he declared Henry Sarsons to be duly elected to the vacant office of town-councillor.

6. The returning officer, John Sadler, appointed certain persons to act as presiding officers at each of the said polling-stations. At polling-station No. 130 he appointed Mr. J. B. Smith, a solicitor, returning officer.

7. Upon an elector attending to vote, and applying for a ballot-paper at polling-station No. 130, the presiding officer, J. B. Smith, first marked upon the face of the ballot paper the number of such voter appearing on the burgess-roll, and then delivered the same out so marked to the voter as and being a ballot paper to be used by him; and the same was accordingly used by him for the purpose of voting. This course the presiding officer followed in the case of every ballot paper used or attempted to be used at the polling station No. 130 at the said election. The returning officer, John Sadler, was not aware of this being done, or having been done, until after the polling was closed.

8. The number of ballot papers so marked by the presiding officer, J. B. Smith, was 294, of which 234 were given in favour of the petitioner Woodward, and the remainder in favour of the respondent Sarsons. The burgess-roll numbers so marked by the presiding officer upon the said ballot papers were in fact not seen so as to be identified; but they could have been seen by the persons present at the counting of the ballot papers, who were the returning officer and his assistant, the petitioner, the respondent, and their respective agents, one for each: and, by referring to the burgess-roll, such persons could have identified the voters who had made use of such ballot papers.

9. The presiding officer, J. B. Smith, did not make out any ballot paper account or statement shewing the number of ballot papers intrusted to him, and accounting for them under the heads of ballot papers in the ballot box, unused, spoilt, and tendered ballot papers, or any account or statement to that or the like effect.

10. At polling-station No. 125 about twenty ballot papers were

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marked by the presiding officer at that station by the direction of voters who were unable to read. Each of such ballot papers was placed by the presiding officer in the ballot box wrapped up in the declaration of inability to read made by the voter for whom such vote was so marked as aforesaid. The declarations of inability to read of the votes so marked by the said presiding officer as aforesaid were not made up into a separate packet, sealed with the seal of the said presiding officer, and so delivered to the returning officer, but were delivered to him in the ballot box with the ballot papers as aforesaid. Each of the votes so given and so marked by the said presiding officer as aforesaid could have been but was not in fact identified by the returning officer at the counting of the votes, by comparing the declaration of inability to read in which each such ballot paper was wrapped as aforesaid with the ballot paper.

11. Subsequently to the presentation of the petition herein, and in the month of January, 1875, having obtained inspection of the ballot papers under the order of the county court, the petitioner observed certain marks upon and matters in connection with certain of the said ballot papers, and now contends that the twenty-two votes hereinafter mentioned ought to have been rejected by the said returning officer, by reason of the ballot papers by which the same were given bearing writings or marks by which the voter could be identified, or because they were void for uncertainty.

The following are particulars of the writings or marks on the said ballot papers and of the facts alleged to render them void for uncertainty :—

(1) Two ballot papers, Nos. 844 and 889, bearing the name "Sarsons" opposite the name of the respondent Sarsons printed upon such ballot papers.

(2) Five ballot papers, Nos. 433, 926, 928, 1304, and 1426 marked with two crosses instead of one.

(3) One ballot paper, No. 1726, marked with three crosses instead of one.

(4) One ballot paper, No. 2140, marked with a straight stroke, in addition to the cross.

(5) One ballot paper, No. 3562, marked with the letter P, in addition to the cross.

(6) One ballot paper, No. 875, marked with an oblique line, instead of a cross.

(7) One ballot paper, No. 641, marked with a star, instead of a cross.

(8) One ballot paper, No. 911, having a pencil line through the name of Woodward and a cross opposite that of Sarsons.

(9) One ballot paper, No. 638, bearing the voter's signature.

(10) Eight ballot papers, Nos. 505, 190, 155, 117, 174, 183, 842, and 1413, with a cross placed on the left instead of the right hand side of the candidate's name.

Appendix A. (which was annexed to the case) contained exact illustrations of the marks appearing on these twenty-two ballot papers.

The returning officer, John Sadler, did not reject any of these ballot papers as invalid, but allowed the whole as good and valid votes, and counted them for the respondent, Henry Sarsons. No objection was made thereto at the counting of the votes; and in fact the petitioner's present contention is based on information obtained on the inspection of the ballot papers on the 11th of January, 1875.

12. On the inspection of the ballot papers on behalf of the respondent Henry Sarsons,—which took place subsequently to the inspection on behalf of the petitioner,—it appeared that the ten ballot papers hereinafter mentioned had been dealt with by the respective voters in a manner similar to that shewn in the case of some of the twenty-two ballot papers specified in Appendix A.

In the appendix to the case marked B. were exact illustrations of the marks appearing upon the said ten ballot papers, which the returning officer counted as good and valid votes in favour of the petitioner. (1) No objection thereto was made at the counting of the votes.

13. The returning officer, John Sadler, rejected all the ballot

(1) No. 1290 had a mark like an inverted y above the cross.

Nos. 1632 and 3672 had each a small additional cross in the margin.

No. 410 had a mark like *cu* above the cross.

No. 1374 was torn through the centre of the paper longitudinally.

In Nos. 1391, 1592, 2619, 3641, and 3642, the cross was on the left of the name of the candidate.

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papers used at polling-station No. 130. As to certain of the said ballot papers, there were, in addition to the burgess-roll number, other objections to them.

14. The returning officer, John Sadler, in rejecting the ballot papers mentioned in the last preceding paragraph, and in rejecting other ballot papers, making with these rejected papers 308 rejected ballot papers, did not indorse upon any of the papers so rejected by him the word "rejected," or any similar word: but, as he came to each rejected ballot paper, he put the same aside, and, after he had finished the counting, placed all the rejected ballot papers together in a brown paper parcel, which he then sealed up and indorsed "Rejected Ballot Papers, Nechell's Ward, 1874," and handed, with the ballot papers and accounts connected with the said election, to the town-clerk of Birmingham. Before rejecting the said ballot papers, the returning officer consulted the town-clerk, and acted upon his advice.

15. The returning officer, John Sadler, did not make any report of the ballot papers rejected and not counted by him, save as above: but he filled up a return in conformity with No. 9 of the printed instructions supplied to him as returning officer. (1)

(1) The following is a copy of these instructions, which formed part of the case:—

BOROUGH OF BIRMINGHAM. INSTRUCTIONS TO RETURNING OFFICERS.

Counting Votes.

The returning officer will attend at , at 4 o'clock p.m. on the day of election to receive the ballot boxes and papers from the officers: when *all* the boxes have been delivered to him, he will then,

1. Open the ballot boxes.

2. Count the number of ballot papers in each box separately, and record the number on the inclosed form.

3. Mix all the ballot papers together (keeping their faces upwards).

4. Sort into separate packets the votes for each candidate, and the doubtful votes.

5. Examine the doubtful votes, and reject for the following reasons only:—1. For want of official mark,—2. Voting for more candidates than entitled to,—3. Writing or mark by which voter could be identified,—4. Unmarked, or void for uncertainty.

6. Count the votes for each party. [It is very convenient to arrange them in heaps of twenties.]

7. Seal up in separate packets,—1. The counted ballot papers,—2. The rejected ballot papers.

[The packets of tendered ballot papers, marked copy of ward list, and counterfoils, must not be opened.]

8. Verify the presiding officer's ballot paper accounts.

9. Fill up and sign return on the printed forms herewith, and cause one of them to be posted immediately on the outer door of the building in which the counting takes place, and inclose the others in an envelope, and send them to the town-clerk.

16. The petitioner contends that, upon the facts stated in this case, the respondent Sarsons was not duly elected.

17. The respondent Sarsons contends that he was duly elected.

18. The respondent Sadler contends that the election was not rendered invalid by any act or default on his part, or for which he is responsible.

The question for the opinion of the Court was, whether the election of the respondent Henry Sarsons was invalid on any of the grounds raised by the petition and particulars.

The decision of the Court upon this case was to be certified in the usual manner; and the costs of and incidental to the presentation of the petition and to the proceedings consequent thereon, and of the special case, were in the discretion of the Court, and were to be borne and paid according to the order of the Court.

The case was argued in Trinity Term last. The arguments are so fully stated in the judgment as to render it unnecessary to give them at any length here.

June 10. *C. Russell, Q.C.* (*Chandos Leigh* with him), for the petitioner, commented upon the following sections and rules of the Ballot Act, 1872, 35 & 36 Vict. c. 33, ss. 2, 12, 13, 15, and rules 16, 24, 26, 29, 30, 31, 32, 33, 36, 37, 38, 42,—contending that the election was void because it had not been conducted in accordance with the provisions of the Act, the deviations from the principles of the Act and the rules being so great that the election could not be said to be an election under the Ballot Act at all; and that the petitioner was not bound, in order to sustain the objection, to shew that, on a scrutiny, the respondent would be in a minority; but that it was enough for him to shew that so large a body of electors as those who did vote or who might have voted at the polling station No. 130 were or might have been virtually disfranchised by the misconduct or mistake of the presiding officer, and that the result of the election was or might have been thereby

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10. Direct the constables in attendance to take the boxes and papers to the town-clerk's office.

The returning officer, his assistants and clerks, the candidates, and the duly appointed agents of the candidates, and no other person, except with the sanction of the returning officer, may be present at the counting of the votes.

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affected. He referred to the following cases,—The *Harwich* (2nd) *Case* (1), the *Belfast Case* (2), the *Hackney Case* (3), the *Canterbury Case* (4), the *Wigtown Case* (5), and *Haswell* v. *Stewart.* (6) And, after observing upon the several instances of bad or doubtful votes set out in the Appendices A. and B. in the special case, he submitted that, rejecting the bad votes on the one side and on the other, a balance of good votes would remain in favour of the appellant.

Sir H. James, Q.C. (*Reginald Brown* with him), for the respondent, contended that the error of the presiding officer at the polling station No. 130 was not of sufficient importance to avoid the election at common law, the election being, notwithstanding that mistake, substantially an election by ballot; that a breach of or non-compliance with the requirements of the Ballot Act could not avoid an election, s. 13 of that Act containing no provision to that effect; and that the mistake relied on had not in fact at all affected the election. He cited the *Warrington Case* (7), and scrutinized the votes referred to in the appendices: and he referred to the following passage from Leigh and Le Marchant, p. 97,—"A non-compliance with the provisions of the Ballot Act, 1872, and Schedules 1 and 2, or a mistake at the poll, will vitiate the election, if it should appear that the result of the election was affected thereby, but not otherwise, provided the election was conducted in accordance with the principles laid down in the body of the Act: s. 13. This view has been previously taken by the election judges, viz. that a trifling irregularity shall not set aside an election. Thus, 'Supposing it happened that the votes of half a dozen out of two or three thousand voters are omitted to be taken, are all the other voters to be set aside, and the election declared void? It would be, in my opinion, ridiculous to say that because at one booth there was an irregularity the whole of the rest of the borough should be put to the trouble of a new election, and all that has taken place declared null and void. I adhere to what Mr. Justice Willes said

(1) 1 P. R. & D. 314.
(2) 7 Ir. Rep. C. L. 30.
(3) 2 O'M. & H. 77.
(4) Kn. & O. 131.
(5) 2 O'M. & H. 215.
(6) 1 Court of Sess. (4th Series) 925.
(7) 1 O'M. & H. 42.

at Lichfield (1), that a judge, to upset an election, ought to be satisfied beyond all doubt that the election was void, and that the return of a member is a serious matter, and not to be lightly set aside:' per Martin, B., in the *Warrington Case.*" (2)

Giffard, Q.C., was heard on behalf of the returning officer.

Chandos Leigh, in reply, submitted that there had been a clear violation of the principles of the Ballot Act. He referred to the *Harwich* (2nd) *Case* (3), the *Limerick Case* (4), the *Boston Case* (5), *Malcolm* v. *Parry* (6), the *Drogheda Case* (7), *Davies* v. *Lord Kensington* (8), the *Petersfield Case, Stowe* v. *Jolliffe* (9), and also to s. 26 of the Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125.

Cur. adv. vult.

July 9. The judgment of the Court (Brett, Archibald, and Denman, JJ.,) was read by

LORD COLERIDGE, C.J. In this case a petition had been presented praying that the election of the respondent Henry Sarsons to the office of town-councillor should be declared void; and a case was stated for the opinion of the Court.

At the election, the petitioner, Woodward, and the respondent Sarsons, were the candidates, and the respondent Sadler was the alderman of the ward and returning officer. The returning officer appointed one Smith to be the presiding officer at polling station No. 130. Upon the electors applying for a ballot paper at such station, the presiding officer marked upon the face of the ballot paper given to each of them the number of the voter appearing on the burgess-roll. This he did to every ballot paper handed out by him. The number of ballot papers so marked and given out by him was 294, of which 234 were given in favour of the petitioner Woodward, and sixty in favour of the respondent Sarsons. The burgess-roll numbers so marked were, in fact, not seen so as to be identified; but they could have been seen by the persons present at the counting of the ballot papers. At polling station

(1) 1 O'M. & H. 22.
(2) 1 O'M. & H. 44.
(3) 1 P. R. & D. 314.
(4) P. & Kn. 355.
(5) 2 O'M. & H. 161.
(6) Law Rep. 9 C. P. 610.
(7) 2 O'M. & H. 201.
(8) Law Rep. 9 C. P. 720.
(9) Law Rep. 9 C. P. 446.

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No. 125, about twenty ballot papers were marked by the presiding officer by the direction of voters who were unable to read. Each of such ballot papers was placed by the presiding officer in the ballot box, wrapped up in the declaration of inability to read made by the voter for whom such vote was marked. Each of the votes so given and so marked by the presiding officer could have been (but was not in fact) identified by the returning officer at the counting of the votes, by comparing the ballot papers with the declarations of inability in which they were wrapped. Twenty-two ballot papers which had been counted as valid were, on inspection after the presentation of the petition, found to be marked in a manner to which objection was now taken. It was contended that they ought all to have been rejected.

The returning officer declared at the election the number of votes thus:—For Sarsons, 965; for Woodward, 775;—majority for Sarsons, 190; and he thereupon declared Sarsons, the respondent, to be duly elected.

The petition, without praying for a scrutiny, prayed that it might be determined that Sarsons was not duly elected, and that the election was void.

Upon these facts, it was argued, on behalf of the appellant, that the election was void, because it had not been conducted in accordance with the Ballot Act; that it was void on that account according to the common law of Parliament, because the deviation from the Act was so great that the election could not be said to be an election by ballot; that it was void under the Ballot Act itself, according to s. 13, because it had not been conducted according to the rules in the schedules, nor in accordance with the principles laid down in the body of the Act, and the non-compliance with the principles of the Act had affected the result of the election; and, as to the last allegation, it was said that the petitioner was not bound, in order to prove it, to shew that on a scrutiny the respondent would be in a minority, but it was enough if he could shew that so large a body of electors as those who did vote or who might have voted at the polling station No. 130, were or might have been virtually disfranchised.

On behalf of the respondents it was urged that the admitted error of the presiding officer at the polling station No. 130 was

not of sufficient importance to avoid the election at common law, because the election was, notwithstanding such error, substantially conducted as an election by ballot; that in this case it could be demonstrated that the mistake relied on had not affected the result of the election; that a breach of the Ballot Act, however extensive, cannot as such avoid an election, for there is no enactment in the Act to that effect; that no such enactment is contained in s. 13; that it is an enactment to save certain elections, and not to invalidate any; that it is an enactment of extreme caution, stating as law that which was equally the law before.

Arguments were then gone into as to the alleged validity and invalidity of different classes of votes which had been counted. This was not done as by way of scrutiny, but in order to determine whether the alleged mistakes had or had not affected the result of the election.

The questions raised for decision seem to be,—first, what is the true statement of the rule under which an election may be avoided by the common law of parliament?—secondly, is the present case brought within the rule?—thirdly, whether a breach of the Ballot Act can, as such, be a ground for avoiding an election,—fourthly, if yes, can this election be thereby avoided?

As to the first, we are of opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as matter of fact, either that there was no real *electing* at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i. e. that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as, by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied or supplied with

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such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors *may have been* prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament. This, we think, is the result of comparing the judgments of Grove, J., at Hackney (1) and Dudley (2) with the judgment of Martin, B., at Salford (3), and of Mellor, J., at Bolton (4), all of which judgments are in accordance with, but express more accurately, the grounds of the decisions in parliament in the older cases of Norfolk (5), Morpeth (6), Pontefract (7), Coventry (8), New Ross (9), and Drogheda (10),—all of which are mentioned in Rogers on Elections, 10th ed. 365, et seq.

As to the second, i. e. that the election was not really conducted under the subsisting election laws at all, we think, though there was an election in the sense of there having been a selection by the will of the constituency, that the question must in like manner be, whether the departure from the prescribed method of election is so great that the tribunal is satisfied, as matter of fact, that the election was not an election under the existing law. It is not enough to say that great mistakes were made in carrying out the election under those laws: it is necessary to be able to say that, either wilfully or erroneously, the election was not carried out under those laws, but under some other method. For instance, if,

(1) 2 O'M. & H. 77, 81.
(2) 2 O'M. & H. 115, 121.
(3) 1 O'M. & H. 133, 140.
(4) 2 O'M. & H. 138, 142.
(5) 9 Journ. 631; Heyw. Co. 555, (n).
(6) 1 Doug. El. C. 147.
(7) 1 Doug. El. C. 377.
(8) P. & Kn. at p. 338; C. & R. at p. 276.
(9) 2 P. R. & D. 188.
(10) W. & D. 206; and the *Drogheda Case*, 1 O'M. & H. 252, 257.

during the time of the old laws, with the consent of a whole constituency, a candidate had been selected by tossing up a coin, or by the result of a horse-race, it might well have been said that the electors had exercised their free will, but it should have been held that they had exercised it under a law of their own invention, and not under the existing election laws, which prescribed an election by voting. So now, when the election is to be an election by ballot, if, either wilfully or erroneously, a *whole constituency* were to vote, but *not by ballot at all*, the election would be a free exercise of their will, but it would not be an election by ballot, and therefore not an election under the existing election law. But, if in the opinion of the tribunal the election was substantially an election by ballot, then no mistakes or misconduct, however great, in the use of the machinery of the Ballot Act, could justify the tribunal in declaring the election void by the common law of Parliament. We agree, upon this point, with the answer attributed to Martin, B., before a committee of the House of Commons (1), with his decision at Salford (2), and with the decisions of Mellor, J., at Bolton (3), and of Barry, J., at Drogheda. (4)

If the rule be as thus stated, then the next question is, whether we can say, upon the facts disclosed in the present case, that a majority of the electors have been, or that there is reasonable ground to believe that a majority may have been, by misconduct or error of the presiding officers, prevented from recording their votes with effect. Now, there is no evidence, as it seems to us, that any elector was prevented from recording his vote, or induced not to record it, by what occurred. All who went to vote at the polling station No. 130 did vote. It was argued that a report of the error being there perpetrated might have prevented others from going to vote; but this was answered by shewing that the case finds that no one noticed the error until after the election was over. The result is, that all the electors who desired to vote did vote. And, as to the votes which were given, and which are objected to, it is now known, except as to the twenty, for whom each of them was

(1) Minutes of Evidence before the Select Committee on Parliamentary and Municipal Elections, Leigh & Le M. 2nd ed. 144, n.

(2) 1 O'M. & H. 133.

(3) 2 O'M. & H. 138.

(4) 2 O'M. & H. 201.

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in fact given. In this case, therefore, when the objections to the particular votes have been determined, the effect of the mistakes on the result of the election will be exactly known. If so, there is no room for speculation or doubt as to whether a majority may or may not have been prevented from voting with effect. Those who did not vote were not prevented by the errors which occurred; it will be seen how the majority of those who did vote was affected by such errors. In this case, therefore, it becomes necessary, not by way of scrutiny, but in order to determine whether the majority has been prevented from voting with effect, to determine upon the validity or invalidity of the votes which were given, and to which objection has been taken.

In order to determine this part of the case, it is necessary to consider and determine the construction of the Ballot Act.

Now, first, the Act is divided into the principal part, which contains certain sections, and two schedules which contain certain rules and forms; and by s. 28, "the schedules and the notes thereto and directions therein shall be construed and have effect as part of this Act." The rules and forms, therefore, are to be construed as part of the Act, but are spoken of as containing "directions." Comparing the sections and the rules, it will be seen that for the most part, if not invariably, the rules point out the mode or manner of doing what the sections enact shall be done. And in schedule 2, the first note states that "the forms contained in this schedule, or *forms as nearly resembling the same as circumstances will admit*, shall be used." And on the ballot paper, as given in the schedule, is, "*Directions* as to printing ballot paper," and "Form of *directions for the guidance of voters in voting*," &c. These observations lead us to the conclusion that the enactments as to the rules in the first schedule, and the forms in the second, are directory enactments, as distinguished from the absolute enactments in the sections in the body of the Act. And in such case, in order to determine the preliminary question, which is, whether there has been a material breach of the Act,—and which must be determined before determining what effect such breach has upon a vote or on the election,—the general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled

substantially. The 2nd section enacts, as to what the voter shall do, that "the voter, having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in an inclosed box." This is all that is said in the body of the Act about what the voter shall do with the ballot paper. That which is absolute, therefore, is, that the voter shall mark his paper *secretly*. How he shall mark it, is in the directory part of the statute. By rule 25, "the elector, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station, and *there mark his paper* and fold it up so as to conceal his vote, and shall then put his ballot paper so folded up into the ballot box." This rule, it will be observed, does not yet say how the paper is to be marked. But, in schedule 2 is given the "Form of ballot paper;" and appended to the form is a note which, by s. 28, is to be construed and have effect as part of the Act. This note contains the "Form of directions for the guidance of the voter in voting." "The voter will go into one of the compartments, and with the pencil provided in the compartment place a cross on the right hand side, opposite the name of each candidate for whom he votes, thus ×." This is the only enactment throughout the statute as to the manner and form in which the voter is to mark the ballot paper. And therefore, by the general rule before mentioned, it would be necessary that the absolute enactment that the paper should be marked secretly should be obeyed exactly; but it would be sufficient that the manner of marking the paper should be obeyed substantially. If these two enactments be so obeyed, there is no material breach of the Act. The extent of error which is to vitiate so as to annul the ballot paper is further to be gathered from the statute itself. By s. 2, "any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is *written or marked, by which the voter can be identified*, shall be void, and not counted." It is not every writing or every mark besides the number on the back which is to make the paper void, but only such a writing or mark as is one by which the voter can be identified. So, in rule 36, "the returning officer shall report the number of ballot papers rejected and not counted by him, under the several

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heads of (1.) 'Want of official mark;' (2.) 'Voting for more candidates than entitled to;' (3.) '*Writing or mark by which voter could be identified;*' (4.) 'Unmarked, or void for uncertainty.'" And then, in schedule 2, in the note to the form before referred to, we have this warning:—"If the voter votes for more than —— candidates, or places *any mark* on the paper *by which he may be afterwards identified*, his ballot paper will be void, and will not be counted." The result seems to be, as to writing or mark on the ballot paper, that, if there be substantially a want of any mark, or a mark which leaves it uncertain whether the voter intended to vote at all or for which candidate he intended to vote, or if there be marks indicating that the voter has voted for too many candidates, or a writing or a mark by which the voter can be identified, then the ballot paper is void, and is not to be counted: or, to put the matter affirmatively, the paper must be marked so as to shew that the voter intended to vote for some one, and so as to shew for which of the candidates he intended to vote. It must not be marked so as to shew that he intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all or for which candidate he intended to vote, nor so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted.

If these requirements are substantially fulfilled, then there is no enactment and no rule of law by which a ballot paper can be treated as void, though the other directions in the statute are not strictly obeyed. If these requirements are not substantially fulfilled, the ballot paper is void, and should not be counted; and, if it is counted, it should be struck out on a scrutiny. The decision in each case is upon a point of fact, to be decided first by the returning officer, and afterwards by the election tribunal, on petition.

Applying these views to the votes in question before us, it is clear that the 294 ballot papers marked by the presiding officer at the polling station No. 130 were void, and ought not to be counted. There was a mark on them by which, on reference to the burgess-roll, the way in which the voter had voted could be identified. As to the twenty ballot papers at the polling station No. 125, there

was a breach by the presiding officer of the directions in rule 26, but there was no breach for which by any enactment the ballot papers can be rejected. The votes were given in the way prescribed; but the presiding officer dealt with the declarations erroneously. We are of opinion that those votes were properly counted. As to the ballot papers in Appendix A., No. 638 is clearly void, and must be disallowed. We, with some hesitation disallow Nos. 844 and 889. There is no cross at all; and we yield to the suggestive rule that the writing by the voter of the name of the candidate may give too much facility, by reason of the handwriting, to identify the voter. But we cannot think that the mere fact of two crosses being placed as in No. 433 or as in 928, ought to vitiate the ballot paper. There can be no doubt as to the intention to vote, and no doubt as to the intention to vote emphatically for the one candidate. If there were evidence of an arrangement that the voter would place two marks, so as to indicate that it was he, that voter, who had used that ballot paper, then, by reason of such evidence, such double mark would be a mark by which the voter could be identified, and then the paper, upon such proof being made, should be rejected. But the mere fact of there being two such crosses is not in our judgment a substantial breach of the statute. Neither is the mere fact of an additional mark such as is found in No. 926, nor the mere fact of the peculiar forms of cross in Nos. 1364 and 641, nor the marks on Nos. 1726, 2140, 3562, or 911, though in these cases also extrinsic evidence of arrangement might make such peculiarities indications of identity. We think that, inasmuch as the ballot paper was handed in by the voter as a vote, the mark on No. 875 substantially indicates that the voter intended to vote for the candidate against whose name it is placed, and that the paper ought to be allowed. And we think the same reasoning applies to Nos. 117, 155, 190, 505, 174, 183, 842, 1413, in which the cross is placed on the left hand side of the candidate's name, instead of on the right hand side. The substance of the direction in the note in schedule 2 is fulfilled, which is in our opinion that the voter should clearly indicate the candidate for whom he intends to vote. If this be done substantially, and the absolute enactment as to secrecy be observed fully, we think the statute is satisfied.

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For the same reasons we in Appendix B. disallow No. 410, but allow all the rest. We are aware that, in so applying the principles which we have deduced from the statute, we are acting apparently in opposition to some of the decisions in the *Wigtown Case* (1); but there may have been evidence in that case which does not exist in the present case, and which made many of the marks there marks of identification; which the mere presence of such marks here does not do. If this was not so, we respectfully differ from the strict view taken by the majority of the learned judges who decided that case, and adhere to the view of Lord Benholme given in that case.

It follows from our decision as to the different ballot papers, that, if the sixty which were given for Sarsons, but properly disallowed at the counting by the returning officer, had not been rendered void by the presiding officer, they would have made the votes for Sarsons 1025; from which striking three disallowed papers in Appendix A., his numbers would have been 1022; and adding the 234 for Woodward, but striking off one disallowed in Appendix B., his numbers would have been 1008. The twenty, being properly in our opinion allowed, do not affect the result.

Inasmuch, therefore, as no voter was prevented from voting, it follows that the errors of the presiding officers at the polling stations No. 130 and No. 125 did not affect the result of the election, and did not prevent the majority of electors from effectively exercising their votes in favour of the candidate they preferred, and therefore that the election cannot be declared void by the common law applicable to parliamentary elections.

But then it is urged that there has been a breach of the Ballot Act, and therefore the election is by virtue of the Act itself void. This is the third question which was raised in argument before us. It is said that s. 13, though it is in a negative form, assumes as an affirmative proposition that a non-compliance with the rules, or any mistake in the use of the forms, would render an election invalid, unless it appeared that the election was conducted in accordance with the principles laid down in the body of the Act and that such non-compliance or mistake did not affect the result

(1) 2 O'M. & H. 215, 227; 1 Court of Sess. Cases (4th series), 925, 231, nom. *Haswell* v. *Stewart*.

of the election. If this proposition be closely examined, it will be found to be equivalent to this, that the non-observance of the rules or forms which is to render the election invalid, must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the voters, or, in other words, the result of the election. It therefore is, as has been said, an enactment ex abundanti cautelâ, declaring that to be the law applicable to elections under the Ballot Act which would have been the law to be applied if this section had not existed. It follows that, for the same reasons which prevent us from holding that this election was void at common law, we must hold that it is not void under the statute.

As between the petitioner and the respondent Sarsons, we therefore hold that this petition must be dismissed with costs.

As between the petitioner and the respondent Sadler, we are of opinion that, inasmuch as there was no personal default by the respondent, and the result of the election was not affected, the petition must be dismissed, each party to bear his own costs.

Petition dismissed.

Agents for petitioner: *Sharpe, Parkers, Pritchard, & Sharpe.*
Agents for respondent: *Young, Maples, & Co.*
Agents for returning officer: *Robinson & Preston.*

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2. —— *Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 133—*Deficiency in Assessments—Completion of Works—Arrears of Deficiency—Parties to Recover—Thames Embankment Act*, 1863 (26 & 27 *Vict. c.* 75).] The defendants were authorized by the Thames Embankment Act, 1863, to construct an embankment on the south side of the Thames, in the parish of St. Mary, Lambeth, and also to make certain street improvements. For these purposes the Act empowered them to take lands, and incorporated the Lands Clauses Consolidation Act, 1845. The power of taking lands so given to them extended to more than was necessary for the mere purpose of the embankment and roadway of the streets; and they were empowered to take and let additional land for building purposes, and sell the ground rents for the purpose of recouping their outlay in making the improvements. The Act

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provided that when the roadway, new streets, and approaches were completed, of which completion a certificate signed by the chairman of the defendants' board, and delivered to the clerk of the peace, should be conclusive evidence, all the ground laid open into the same respectively should be deemed to form part thereof respectively, and be used by the public accordingly. The defendants took lands for the purposes of the Act, and the works were commenced in 1865. On the 11th of May, 1870, the certificate of completion required by the Act was given, but certain additional lands not required for the street improvements still remained in the hands of the defendants unbuilt upon, and were not rated to the poor-rate.—The 133rd section of the Lands Clauses Consolidation Act, 1845, provides that if the promoters of the undertaking become possessed by virtue of that Act, or the special Act, of lands liable to be assessed to the poor's rate, they shall from time to time until the works shall be completed and assessed to such poor's rate, be liable to make good the deficiency in the assessment for poor's rate, by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands with any building thereon were valued or rated at the time of the passing of the special Act, and on demand of such deficiency the promoters of the undertaking or their treasurer shall pay all such deficiencies to the collector of the said assessment.—The overseers of the parish of St. Mary, Lambeth, for the year 1871–1872, demanded of the defendants an aggregate sum representing deficiency of assessment for all the years from 1865 to 1871, no previous demand having been made of any deficiency. The poor-rate accounts of the parish had been duly audited for each of these years and were closed:—*Held*, that the deficiency of assessment could only be recovered up to the date of the certificate, as the works were then complete within the meaning of s. 133, though land taken under the Act by the defendants still remained unbuilt upon. Secondly, that the fact that the works contemplated by the special Act were not such as would be assessable to poor's rates when completed, did not prevent the 133rd section from applying to lands taken for such works. Thirdly, that the defendants were liable to make good all deficiencies caused by lands having been taken for the purposes of the Act, until the date of the certificate of completion of the works, but that as soon as any buildings were erected on any such lands and assessed, or became liable to be assessed, the rateable value of such buildings was to be credited against the deficiency; and fourthly, that the plaintiffs might enforce payment of the aggregate of the deficiencies arising for all the years from 1865 to 1870.—Some of the lands taken were at the passing of the special Act in the occupation of the commissioners of works for public purposes as servants of the Crown, and though in the valuation lists, had not, while in such occupation, been rated:—*Held*, that the defendants were not liable to make good any deficiency in respect of such lands. Stratton *v.* The Metropolitan Board of Works - - - - 76

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BALLOT PAPER—*Municipal Election—Where avoided at Common Law or under the Ballot Act* (35 & 36 *Vict. c.* 33), *s.* 13, *by Non-compliance with the Rules and Forms prescribed—Costs of Petition.*] An election is to be declared void by the common law applicable to parliamentary elections, if it has been so conducted that the tribunal which is asked to avoid it is satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws,—that is, that the constituency have not in fact had a fair and free opportunity of electing the candidate which the majority might prefer, or that there is reasonable ground to believe that a majority of the electors may, by reason of irregularities in the mode of conducting the election, have been prevented from electing the candidate they preferred.—To render an election void under the Ballot Act, by reason of a non-observance of or non-compliance with the rules or forms given therein, such non-observance or non-compliance must be so great as to satisfy the tribunal before which the validity of the election is contested that the election has been conducted in a manner contrary to the principle of an election by ballot, and that the irregularities complained of did affect or might have affected the result of the election.—The ballot paper must not be marked so as to shew that the voter intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all or for which candidate he intended to vote, nor so as to make it possible by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted.—If these requirements are not substantially fulfilled, the ballot paper is void and should not be counted; and, if it is counted, it should be struck out on a scrutiny.—Ballot papers with the name of the voter or of the candidate voted for written opposite to the name of the latter and not marked with a cross, or with the addition of "*cu*" to the cross were held to be void.—But the placing of two crosses or three crosses, or a single stroke (thus /) in lieu of a cross, or a straight line (thus |) or a mark like an imperfect letter P in addition to the cross, or a star instead of a cross, or a cross blurred or marked with a tremulous hand, or a cross placed on the left hand side of the ballot paper, or a pencil line drawn through the name of the candidate not voted for, or a ballot paper torn longitudinally through the centre:—*Held*, not to avoid the vote, in the absence of evidence of connivance or pre-arrangement.—Twenty ballot papers were marked by the presiding officer by the direction of voters who were unable to read. Each of these ballot papers were placed by the presiding officer in the ballot box wrapped up in the declaration of inability to read made by the voter. The declarations of inability to read of the votes so marked by the presiding officer were not made up into a separate packet, sealed with the seal of the presiding officer, and so delivered to the returning officer (pursuant to sched. 1, Part 1, rules 26 and 29), but were delivered to him in the ballot box with the ballot papers as above mentioned. These votes could have been, but were not in fact, identified by the returning officer at the counting of the votes:—*Held*, that notwithstanding this breach by the presiding officer of the direction of the rules, the votes in

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question were properly counted.—At one of the polling stations the presiding officer before delivering the ballot papers to the electors attending to vote marked upon each (to the extent of 294) the number of the voter appearing on the burgess-roll,—which would enable any of the persons present at the counting of the votes to identify the way in which the party had voted. Of the electors who received these ballot papers, 234 voted for the petitioner, and 60 for the respondent. These votes were not counted by the returning officer:—*Held*, that this admitted error of the presiding officer,—which did not affect the result,—did not render the election void either at common law or under the Ballot Act.—Where there have been irregularities in the conduct of an election by the presiding officer at a particular polling station, but there has been no personal default on the part of the returning officer, and the result of the election has not been affected by the mistake of the presiding officer, the returning officer will not be visited with costs. WOODWARD *v.* SARSONS AND SADLER) - 733

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BRIBERY—*Parliament—Election Petition—Corrupt Practices—Joint Candidature—Agency.*] Where a candidate for election to parliament had been guilty of bribery through his agent, by reason of acts committed by such agent to procure votes for him at the election, and subsequently to such acts of bribery another candidate coalesced with him, in ignorance of any previous corruption, and having no reason to suspect its existence:—*Held*, that such last-mentioned candidature was not liable by reason of the joint candidature to be unseated in respect of such acts of bribery. MALCOLM *v.* PARRY AND INGRAM - - 168

2. —— *Corrupt Practices (Municipal Elections) Act*, 1872 (35 & 36 *Vict. c.* 60), *s.* 3—17 & 18 *Vict. c.* 102, *s.* 2—*Bribery, Several Acts of—Several Penalties.*] Where a person has been guilty of several acts of bribery at a municipal election he is liable to a penalty in respect of each such act of bribery. MILNES *v.* BALE. MILNES *v.* LEA - - - - - - 591

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CAB-OWNER—*continued.*
horse being supplied by the owner, and the latter having no control over the driver after leaving the yard. The horse with which the plaintiff was furnished, which was fresh from the country and had never before been harnessed to a cab, overturned the cab and injured the driver. In answer to questions put to them by the judge, the jury found that the horse was not reasonably fit to be driven in a cab; that the plaintiff did not take upon himself the risk of its being reasonably fit to be so driven; that the defendant did not take reasonable precautions to supply the plaintiff with a reasonably fit horse; and that the horse and cab were intrusted to the plaintiff as bailee, and not as servant.—A verdict having been thereupon entered for the plaintiff,—The Court refused to disturb it. Fowler *v.* Lock - - 90

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—— *Pretty* v. *Bickmore* (Law Rep. 8 C. P. 401) followed - - - - 658
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—— *Thomas* v. *Stutterheim* (5 W. R. 6) distinguished - - - - 184
See Oral Examination before Master.

—— *Toplis* v. *Grane* (5 Bing. N.C. 636) followed
See Indemnity. [196

—— *Troughton* v. *Gitley* (Ambl. 629) followed
See Execution Creditor. [645

CAUSE OF ACTION — *Practice—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76) *s.* 18—*Writ for Service out of the Jurisdiction.*] It is sufficient to entitle a plaintiff to proceed under the Common Law Procedure Act, 1852, s. 18, that the breach of contract should have arisen within the jurisdiction. Vaughan *v.* Weldon - 48

2. —— *Prohibition—Mayor's Court, London—Part of Cause of Action arising out of the Jurisdiction.*] Orders were given for goods at Poplar to be delivered to a carrier named by the buyer and to be paid by him. The goods were received by the carrier (on delivery orders handed to him by the seller in the city of London) partly within and partly without the city. An action having been brought for the price in the Lord

CAUSE OF ACTION—*continued.*
Mayor's Court:—*Held*, that part of the cause of action arose out of the jurisdiction of the Court, and therefore the defendant was entitled to a prohibition. Gold *v.* Turner - - - 149

3. —— *Mayor's Court, London—Jurisdiction—Cheque payable at a Place out of the Jurisdiction, where the Drawer (the Defendant) has no Effects.*] The plaintiff sued the defendant in the Mayor's Court, London, as drawer of two cheques upon the Huddersfield branch of the Midland Banking Company. In answer to a rule for a prohibition, it was sworn that the cheques were drawn and indorsed by the payee to the plaintiff in London, that the drawer had no effects in the hands of the Midland Banking Company, and that he had long since had notice from the bank that cheques drawn by him would not be paid unless previously provided for:—*Held*, that, there being no obligation on the plaintiff to prove presentment and dishonor, there was no ground for a prohibition. Wirth *v.* Austin - - - - 689

CERTIFICATE FOR COSTS—County Courts Acts [92, 203
See Costs under County Courts Acts. 1, 2.

—— County Courts Acts - - - 29
See Estoppel by Judgment. 1.

CERTIFICATE OF ACKNOWLEDGMENT — Married woman - - 473, 667
See Conveyance by Married Woman. 1, 2, 3.

CHAMBERS—Appeal—Affidavit - - 474
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CHEQUE—Presentment—No effects - 689
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"CHILDREN"—Will—Devise - - 701
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CLAIM OF RIGHT—Justices' jurisdiction - 662
See Justices' Jurisdiction.

COMMENCEMENT OF RISK—Insurable interest
See Insurable Interest. [58, Ex. Ch. 609

COMMON LAW PROCEDURE ACT, 1852, s. 18 48
See Cause of Action. 1.

CONCEALMENT OF MATERIAL FACTS—*Insurance on Freight—Warranty as to Amount of Insurance on Hull—Non-communication of a material Fact coming to the Knowledge of the Assured after Acceptance of Risk but before issuing the Policy.*] A proposal for insurance on freight was made and accepted on the 11th of March. On the 16th, the ship was lost. On the 17th, the assured, with knowledge of the loss, but without communicating it to the insurers, demanded a stamped policy. The insurers then, for the first time, required to be informed as to the amount of the insurance upon the hull, and inserted in the policy (which the assured accepted), the following warranty, "Hull warranted not insured for more than 2700*l.* after the 20th March." The vessel was then insured for an additional 500*l.* in an insurance club, by the rules of which all ships belonging to members were insured from the 20th of March in one year to the 20th of March in the following year, "and so on from year to year unless ten

CONCEALMENT OF MATERIAL FACTS—*contd.*
days' notice to the contrary be given; and in the absence of notice the managers of the club were to to renew each policy on its expiration:—*Held*, affirming the decision of the Court below, that, notwithstanding those rules, the club policy was not a continuing policy beyond the 20th of March of the current year; and that the ship having been lost before that date, no new effective policy could have been made, and, consequently, the warranty was complied with.—*Held*, also, that the risk having been accepted by the insurers on the 11th of March, the addition on the 17th of a term for their benefit, and not affecting the risk, did not prevent the policy from being one drawn up in respect of the risk accepted on the 11th, and, therefore, upon the authority of *Cory* v. *Patton* (Law Rep. 7 Q. B. 304), the concealment of the loss was not a concealment of a material fact so as to avoid the policy. Lishman *v.* Northern Maritime Insurance Company - - Ex. Ch. 179

CONDITIONS OF SALE—*Vendor and Purchaser—Purchaser's Right to insist upon the Presence of the Vendor at Completion—Damages for Purchaser's Default—Deposit.*] Upon a sale of real property, the purchaser has not an absolute right in all cases to require the vendor's presence at the completion of the purchase. Whether such a requisition is reasonable or not, will in each case be a question for the jury.—The fact of the vendor having been confined in a lunatic asylum is not a reasonable ground for insisting upon a departure from the ordinary course, when it is duly certified and sworn that he was competent at the time of executing the conveyance. By the conditions of sale it was provided as follows:—"Should the purchaser neglect or fail to comply with any of the above conditions, his deposit-money shall be absolutely forfeited to the vendor, who shall be at liberty to re-sell the property by public auction or private sale; and, if the amount or price which shall be obtained by such second sale shall not be sufficient to cover the amount bid for the same at the present sale and all the expenses of or incidental to the present sale, the deficiency shall be paid by the defaulter to the vendor." The purchaser paid a deposit, but failed to complete the purchase. There was no re-sale:—*Held*, that the vendor was entitled to retain the deposit, and also to recover the auctioneer's charges for the abortive sale, and the costs incurred by him in preparing to complete the sale. Daniell *v.* Essex - - 538

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—— Failure—Sale of lands - - - 334
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—— Failure of consideration - - - 334
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—— Proposal—Acceptance - - - 102
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—— Rescission—Fraud - - - 166
See Plea of Fraud.

CONTRACT—*continued.*
—— Rescission—Insolvency - - - 15
See Rescission of Contract.

—— Work and labour—Sale - - - 271
See Property in Goods. 2.

CONTRACT BY CORPORATION—*Seal—Interest in Land—Statute of Frauds, s.* 4.] The defendants, a municipal corporation, were possessed of a dock of which they allowed the use to ships needing repairs, under certain printed regulations. The plaintiff entered into a parol agreement with the defendants for the use of the dock, upon the terms of such regulations. By these regulations it was provided that the dock should be "let" to parties requiring the same for the repair of vessels at such rates as the council of the borough should from time to time sanction, and that vessels entered in a book kept by the borough treasurer should be allowed to enter the dock, as far as possible, according to the order of entry in the book. The regulations contained provisions that the defendants should be entitled to detain the vessel in the dock until the dockage was paid, that the corporation foreman should open and shut the dock gates, and various other provisions tending to shew that the defendants intended to retain possession of and control over the dock while in use by vessels, The defendants did not admit the plaintiff's vessel into the dock in her turn:—*Held*, in an action for breach of contract by the plaintiff against the defendants, that the contract was not for an interest in land within the 4th section of the Statute of Frauds, and therefore need not be in writing; and, secondly, that the contract need not be under the seal of the corporation. Wells *v.* Mayor, &c., of Kingston-upon-Hull - - - - - - 402

CONVEYANCE BY MARRIED WOMAN—*Acknowledgment—3 & 4 Wm. 4, c. 74—Affidavit of Verification sworn in Guernsey.*] The affidavit verifying the certificate of the due taking of an acknowledgment of a married woman under 3 & 4 Wm. 4, c. 74, may be sworn in Guernsey before the chief bailiff and two jurats of that island. Re Eleanor Mary Mann - - - - - - 473

2. —— *Acknowledgment—3 & 4 Wm. 4, c. 74—Filing Documents—Special Commission not returned.*] The acknowledgment of a deed by a married woman, under 3 & 4 Wm. 4, c. 74, was taken before special commissioners in Melbourne, but the documents were by mistake returned to this country without having the commission annexed to them:—The Court,—upon being satisfied by affidavit that the acknowledgment had been properly taken by two of the persons to whom the commission was addressed,—allowed the document to be filed.—The omission of one of three Christian names of one of the commissioners allowed to be supplied by an affidavit of identity. Re Matilda Edsall. Re Emily Thomas 472

3. —— *Acknowledgment under 3 & 4 Wm. 4, c. 74—Omissions in Jurat of Affidavit of Verification—Notarial Certificate.*] The Court allowed a certificate of acknowledgment under 3 & 4 Wm. 4, c. 74, taken at Loch Haven, Pennsylvania, to be filed, notwithstanding that the jurat of the affidavit of verification was defective, in not naming the place where the acknowledgment was taken, or

CONVEYANCE BY MARRIED WOMAN—*contd.*
describing the deponent,—there being a notarial certificate identifying the place and the parties. *Re* Ann Coldwell - - - - 667

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See Copyright in Play.

COPYRIGHT IN PLAY—*Dramatic Copyright—Infringement, what amounts to—3 & 4 Wm. 4, c. 15, s. 2.*] To constitute an infringement of dramatic copyright under 3 & 4 Wm. 4, c. 15, s. 2, a material and substantial part of the plaintiff's dramatic production must be pirated. Though an appreciable part be taken, it does not follow as a consequence of law that the plaintiff's right is infringed, if such part be of a very unessential nature, or very unimportant and trifling in relation to the effect of the whole composition. Chatterton *v.* Cave - - - - 572

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CORRUPT PRACTICES (MUNICIPAL ELECTION) ACT, 1872 - - - 711, 726
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—— Prohibition - - - - 607
See Costs of Prohibition.

—— Security - - - - - - 438
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COSTS OF ELECTION PETITION—*Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), s. 19, subs. 1—Costs of Petition.*] The costs of and incidental to a petition under the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), are in the sole and absolute discretion of the commissioner who tries the petition; and his decision cannot be reviewed by the superior Court, how flagrantly wrong soever it may be.—P., an unsuccessful candidate at a municipal election, having been joined as a respondent in a petition against the return of the successful candidates, a case was stated for the opinion of this Court as to whether or not he had been properly made a respondent; and the commissioner ordered that, in the event of the Court being of opinion that he was improperly so joined, P. was to receive his costs from the petitioner. The Court having decided in favour of P.:—*Held*, that, having made him a respondent, it was not competent to the petitioner to say that P. was not properly "a party to the petition," and therefore not entitled to costs. Lovering *v.* Dawson (No. 2) - 726

—— - - - - - - 733
See Ballot Paper.

COSTS OF PROHIBITION—*Practice—Prohibition, Rule for—Mayor's Court.*] The Court, in making a rule absolute for a prohibition without pleadings, may grant the costs. Wallace *v.* Allen 607

COSTS UNDER COUNTY COURT ACTS—*Certificate under 30 & 31 Vict. c. 142, s. 5—Review of Judge's Discretion.*] In dealing with s. 5 of the County Courts Amendment Act, 30 & 31 Vict. c. 142, the question is not simply whether the action should have been brought in the superior Court; but the judge is justified in declining to certify for costs, if he is reasonably satisfied that the action should not have been brought at all.—His discretion in this respect is open to review.—Where, therefore, the judge, although a substantial claim of right was put in issue by the pleadings and contested at the trial, refused to certify for costs under that section, because he thought that the action was not bonâ fide brought to try the right, but merely to gratify an angry feeling against the defendant, the Court,—Denman, J., doubting,—declined to interfere, not being satisfied that the judge's discretion had been wrongly exercised.—*Hinde* v. *Sheppard* (Law Rep. 7 Ex. 21) observed upon. Strachey *v.* Lord Osborne - - - - 92

2. —— *Certificate under* 30 & 31 *Vict. c.* 142, *s.* 5 *—Plea of Non-joinder of Co-contractors—Amendment under s.* 38 *of the Common Law Procedure Act*, 1852.] The plaintiff brought an action against A. to recover 356*l.* 7*s.* for coals sold and delivered. On the same day as that on which the writ was issued A. sent the plaintiff a cheque for 319*l.* 3*s.* 8*d.*, which he received on the following day, and acknowledged as received on account. The plaintiff declared against A., who pleaded in abatement the non-joinder of two co-contractors, B. and C. The plaintiff thereupon amended his writ and declaration under s. 38 of the Common Law Procedure Act, 1852, by adding B. and C. as defendants; and the three defendants pleaded payment into Court of 1*l.* 6*s.* 11*d.*, payment as to the residue, and never indebted. The cause was referred to an arbitrator, the costs to abide the event of the award, and the arbitrator to have power to amend and to certify for costs.—The arbitrator amended the plea of payment according to the facts, by making it a plea of payment (except as to 1*l.* 6*s.* 11*d.*) by A. after the issuing of the writ, and before the plea in abatement, and before the action was commenced as against the other two defendants by the amendment; and as to the first issue he found by his award that the defendants were indebted to the plaintiff in the sum of 322*l.* 4*s.* over and above the 1*l.* 6*s.* 11*d.* paid into Court; at to the issue on the amended plea, he found that the defendants satisfied and discharged 319*l.* 3*s.* 8*d.*, parcel of the claim, by payment; and he directed the verdict to be entered for the plaintiff with damages 3*l.* 0*s.* 4*d.*, being the difference between the two sums of 322*l.* 4*s.* and 319*l.* 3*s.* 8*d.*, and being in addition to the 1*l.* 6*s.* 11*d.* paid into Court; and he refused to certify for costs under 30 & 31 Vict. c. 142, s. 5:—*Held*, that, the plaintiff having recovered in the action against the three defendants less than 20*l.*, he was not in the absence of a certificate, entitled to the costs of the cause even as against A. Balmain *v.* Lickfold - - - 203

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COVENANT NOT TO ASSIGN—*Landlord and Tenant— Breach of Covenant not to underlet, &c. —Waiver by Acceptance of Rent — Continuing Breach.*] A lease of a farm contained a covenant on the part of the lessee not to "assign or demise to or permit any other person to occupy the premises, or any part thereof, without the consent in writing of the lessor," and a proviso for re-entry by the lessor for any breach. By agreement in writing the lessee underlet a portion of the farm to one T. for one year from the 31st of January, 1873, and the lessor, on the 30th of September, 1873, with knowledge of the underletting, distrained for and received rent due on the 29th :—*Held*, that the lessor had waived the breach of the covenant not to "assign or demise" without consent; and the permitting T. to remain in the occupation of the land during the remainder of the year was not a new or continuing breach of the covenant not to "permit any other person to occupy" without consent. Walrond *v.* Hawkins - - - - - - 342

DAMAGE TO PERSONAL ESTATE—Action by executor - - - - 189
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—— Libel—Arrest of judgment - - 502
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—— Sale—Postponement - - - 598
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—— Sale of goodwill—Public-house - 456
See Goodwill.
—— Sale of land - - - - 538
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DAMAGES ON CONTRACT OF SALE—*Statute of Frauds—Postponement of Period for Performance —Parol Variation—Condition Precedent—Readiness and Willingness to deliver—Waiver—Estoppel —Measure of Damages.*] By a written contract the plaintiff agreed to deliver, and the defendants to accept, a certain quantity of iron, of greater value than 10*l.*, in the month of June. On the 2nd of June, and again in the middle of June, one of the defendants saw the plaintiff, and verbally requested him to allow the delivery of the iron to stand over, and the plaintiff verbally consented to his request. On the 1st of August the plaintiff pressed the defendants to take delivery, and the defendants, after some correspondence, wrote on the 9th of August asking for further time. The plaintiff again waited, but without result. On the 20th of October the plaintiff brought his action for non-acceptance of the goods in accordance with the terms of the written contract.—It was contended by the defendants that by reason of the arrangement to postpone delivery and acceptance made before any breach of the contract, the plaintiff could not recover upon the original contract, there never having been readiness and willingness to deliver or any tender

DAMAGES ON CONTRACT OF SALE—*contd.*
of delivery on the plaintiff's part under such contract; and that the plaintiff could not rely on any new or substituted contract to accept at a later date, such contract being verbal only:—*Held*, that, the true effect of what took place between the parties being that the plaintiff voluntarily withheld delivery at the request of the defendants, no new contract being substituted for the original written contract, the plaintiff was entitled to maintain his action; and that the damages must be estimated according to the market-price of iron at a reasonable time after the last request of the defendants to withhold delivery. Hickman *v.* Haynes - - - - - - 598

DAMAGES ON JOINT CONTRACT — *Damages, Measure of—Joint Contractors—Set-off—Recoupment of some of several Persons jointly contracted with.*] In an action for breach of a contract for the quick discharge of a ship made with several persons jointly, where some of the plaintiffs had made profits by reason of such breach of contract which they would not otherwise have made, through another ship in which they were interested having been substituted for the purpose for which the former ship was required:—*Held*, that the amount of the joint damages could not be reduced by the profits so made by some of the plaintiffs individually. Jebsen *v.* East and West India Dock Company - - - 300

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DEVISE TO "CHILDREN"—*Will, Attestation of —Devise to "Children" as a Class, as Joint-tenants —Wills Act* (7 *Wm.* 4 & 1 *Vict. c.* 26), *ss.* 9, 15.] Testator devised lands to his niece Sarah for life, and after her death to her husband Joseph for his life, and then "to be equally divided among the children of the above-named Joseph and Sarah, either by the proceeds from the sale of the properties or otherwise, as may be considered most advantageous at the time."—There were eight children of the niece living at the date of the will and at the death of the testator, of whom two were respectively named Thomas and Sarah.—Thomas was an attesting-witness to the will. Sarah was present when the testator executed the will, but she did not sign it in his presence so as to make her a good attesting-witness within the Statute of Wills:—*Held*, that, the devise being to the "children," as joint-tenants, and not as tenants in common, the forfeited shares of the attesting-witnesses (assuming Sarah to have been an attesting-witness) survived to the other joint-tenants, and did not pass to the heir-at-law. — *Quære*, whether Sarah could be considered as an attesting-witness at all? Fell *v.* Biddolph - 701

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ENROLMENT OF ARTICLES—*Attorney—Articles of Clerkship—Enrolment nunc pro tunc*—6 & 7 *Vict. c.* 73, *s.* 8.] The mere failure to obtain payment of a debt due to the clerk at the time of his entering into articles, so as to enable him to pay the stamp-duty and enrol the articles and affidavit within the time limited by the statute, is not such a disappointment of a "reasonable expectation" that he would be prepared with the money in due time as will induce the Court to allow the articles to be enrolled nunc pro tunc. Ex parte Banyard - - - - - - 638

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EQUITABLE SET-OFF—*Bill of Exchange—Part Payment by Drawer—Equitable Set-off by Acceptor—Bankrupt Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 39.] To a declaration by the holder against the acceptor of several bills of exchange, the defendant pleaded, by way of equitable defence, that the drawers became bankrupt, and that the plaintiff

EQUITABLE SET-OFF—*continued.*

received 425*l.* as a dividend from their estate on account of the bills, and as to that sum was suing only as trustee for the drawers; and the plea claimed to set off a debt due to the defendant from the drawers:—*Held*, a good equitable defence pro tanto. Thornton *v.* Maynard - 695

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—— Railway company—Advice-note - 307
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ESTOPPEL BY CONDUCT—*Railway Company—Common Carriers—Negligence—Estoppel.*] The plaintiff bought goods which were to be consigned to him at Liverpool from St. Helen's by the defendants' railway. On the 7th of July, 1873, the plaintiff received advice-notes from the defendants informing him that *three* parcels of goods had been received by them for his account, and that they held them subject to his order and to the payment of rent and charges. The plaintiff immediately instructed his broker to sell the whole. Early in August the plaintiff received invoices of the three parcels from his vendors, and paid for the whole by an acceptance which was duly honoured. The goods were sold on the 21st of August, and the rent and charges on the *three* parcels were paid to the defendants by the broker: but it turned out that *two* parcels only had been delivered to the defendants (the third still remaining on the premises of the vendors), and the plaintiff was obliged to pay to his vendees 5*l.* 4*s.* 1*d.*, the difference between the price at which they had bought the third parcel and what they had to pay for other goods. The defendants' servants were aware on the 9th of July that they had never received the third parcel, but no notice of the mistake was given to the plaintiff until the 1st of September, after the goods had been re-sold and the charges paid:—*Held*, in a special action for non-delivery of the third parcel, with a count in trover, that the defendants were not estopped from shewing that the goods had never reached their hands, and consequently could neither be liable in trover nor for breach of contract in not delivering the goods.—Ordinary definitions of an estoppel in pais. Carr *v.* The London and North Western Railway Company - 307

ESTOPPEL BY JUDGMENT—*Judgment of an Inferior Court of Competent Jurisdiction—County Court—Costs—Certificate under* 30 & 31 *Vict. c.* 142, *s.* 5, *not affected by the Provision in* 19 & 20 *Vict. c.* 108, *s.* 39.] A. occupied a cottage under B., who, on the 14th of March, 1873, proceeded against him before magistrates, under statute 1 & 2 Vict. c. 74, for not quitting on a week's notice, and obtained a warrant or order for his eviction, and turned out him, his family, and furniture on the 21st of April.—B. then sued A. in the Reading county court for 29*s.* alleged to be due for twenty-nine weeks' "rent of a cottage," at 1*s.* per week; and in support of his claim he put in an agreement signed by his agent, and purporting to be "marked" by A. A. swore that his tenancy

ESTOPPEL BY JUDGMENT—*continued.*

was a yearly and not a weekly tenancy, that the agreement produced was fraudulent, and that the mark purporting to be his was not put thereto by him or by his authority. The judge gave judgment for A.,—affirming the tenancy to be *yearly*.—In August, 1873, A. took out a summons in the county court against B., to recover damages for the eviction, and for injury to his goods. The proceedings on the summons were stayed by B. by giving a notice and making a deposit with the registrar of the court, under 19 & 20 Vict. c. 108, s. 39.—A. then brought his action in this Court. The pleadings raised the question of fact whether the tenancy was a yearly or weekly tenancy; and there was also a replication setting up the judgment of the county court by way of estoppel; and at the trial the jury found, upon the evidence before them, that the tenancy was *weekly*. The judge, however, ruled that the judgment of the county court (on proof that the matter tried in that court was the same as that in issue in this Court) was a conclusive estoppel against the defendant; and thereupon he directed a verdict to be entered for the plaintiff (the damages being assessed by the jury at 5*l.*), reserving leave to the defendant to move to enter a verdict for him, if the Court should be of opinion that he was not concluded by the trial and judgment in the county court:—*Held*,—upon the argument of the rule and of a demurrer to a rejoinder of nul tiel record,—that the judgment of the county court, being a court of competent jurisdiction, was conclusive as an estoppel.—At the trial the judge declined to certify, under 30 & 31 Vict. c. 142, s. 5, that "there was sufficient reason for bringing the action in the superior Court:"—*Held*, that he was justified in so doing, notwithstanding that the plaintiff was prevented from suing in the county court by the defendant's availing himself of 19 & 20 Vict. c. 108, s. 39:—*Held*, also, that that provision does not affect the discretion of the judge as to certifying under 30 & 31 Vict. c. 142, s. 5. Flitters *v.* Allfrey 29

2. —— *Pleading—Judgment in previous Action—Estoppel—Release—Condition subsequent—Composition Deed.*] To a declaration on a bill of exchange by the plaintiff, as indorsee, the defendant, the acceptor, pleaded by way of estoppel, setting out the proceedings in a former action by the plaintiff upon the same bill of exchange, in which former action the defendant had pleaded to the further maintenance a composition deed executed after action, by which the defendant's creditors, including the plaintiff, agreed to release him from their debts in consideration of his agreement to pay a composition by two instalments, with a proviso that, on default in payment of the composition, the release was to become null and void. The plea then set forth that the plaintiff had replied to such plea in the first action the non-payment of the first instalment under the deed, and that the defendant had rejoined, on equitable grounds, a mistake in non-payment on the proper day and a subsequent tender; that, thereupon, the plaintiff struck out the replication, confessed the plea, and taxed his costs under the rule of Trinity Term, 1853, which were paid, and that such determination of the first action estopped the plaintiff from bringing

ESTOPPEL BY JUDGMENT—*continued.*

the present action. Replication that after the proceedings in the first action, and before the present action, a second instalment under the deed became payable; that the defendant had made default in payment of it, and that thereby the release in the deed became null and void:—*Held*, that the replication was good. Hall *v.* Levy 154

EVIDENCE—Bill of exchange—Authority to draw
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—— Loss of ship—Perils of the sea Ex. Ch. 609
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—— Negligence - - - 49, 486
See Evidence of Negligence. 1, 2.

EVIDENCE OF NEGLIGENCE—*Railway Company—Over-crowding Carriages—Insufficiency of Staff to control the ordinary Assemblage of Passengers at Stations.*] The plaintiff was a passenger by the defendants' railway. At G. station, the compartment in which the plaintiff was being already full, three extra passengers got in, notwithstanding the plaintiff's remonstrances. At the next station the plaintiff again remonstrated, and, there being a large number of persons on the platform and few porters in attendance, the carriage-door was opened, and more attempted to enter the carriage, but were prevented by the plaintiff and the other passengers. After the train had moved on, the carriage-door remaining open all along the platform, a porter slammed the door to just as it was entering the tunnel; and the hand of the plaintiff, in consequence, as he swore, of the inconveniently crowded state of the carriage, was crushed in the hinge:—*Held*, that, though, taken singly, these several circumstances might not have been sufficient evidence of negligence to charge the defendants, yet, combined, they shewed such a careless and improper mode of conducting the business of the company as to justify the jury in finding them guilty of negligence which was a cause of the accident. Jackson *v.* Metropolitan Railway Company - 49

2. —— *Railway Company — Negligence in allowing an unsound Truck to travel on the line without due Examination.*] The Great Eastern Railway Company have a junction at Peterborough, at which junction they receive from other lines merchandize in trucks to the extent of more than 20,000 weekly, to be conveyed by them to London. In the course of a journey from Peterborough to London, one of these foreign trucks, laden with coal, broke down in consequence of the fracture of an axle, and caused the break-van to come into collision with a passenger-train, whereby the plaintiff (a passenger) sustained injury. The truck in question belonged to a waggon company, whose duty it was to keep it in repair. The course of business at Peterborough was, that every truck, before coming on to the defendants' line underwent some kind of examination as to its general fitness to travel. The particular truck, when submitted to such examination, was found to have a defective spring, and a serious crack in one of its main timbers, and it was accordingly taken into a siding, and was detained there four or five days, for the purpose of having a new spring put on. The truck (which had not been unloaded) was then sent on, with a direction chalked on it by a servant of the waggon company, that it

EVIDENCE OF NEGLIGENCE—*continued.*
should "stop at Peterborough for repairs when empty." Upon a minute examination of the truck after the accident, it was found that the fore-axle, which was 3½ inches thick, had across it, near the wheel, an old crack an inch and a quarter deep, and this was admitted to have been the sole cause of the break-down.—There was conflicting evidence as to whether or not, regard being had to the extent of the traffic at the junction, it was possible to have discovered this defect in the axle by any practicable examination at Peterborough; and the following questions were submitted to the jury—1. Would the defect in the axle which was the cause of the accident have been discovered or discoverable upon any fit and careful examination of it to which it might have been subjected? 2. Was it the duty of the defendants to examine this axle by scraping off the dirt and minutely looking at it,—so minutely as to enable them to see the crack, and so to prevent or remedy the mischief? 3. If that was not their duty upon the first view of the truck, did it become their duty so to do when, upon having discovered the defect [i.e. in the spring and in the sole of the truck], they ordered it to be repaired, and it remained four or five days upon their premises for the purpose?—The jury answered the first question in the affirmative and the second in the negative; and to the third question they answered—"It was their duty to require from the waggon company some distinct assurance that it had been thoroughly examined and repaired."—The learned judge thought the last answer immaterial, and directed a verdict for the defendants, reserving leave to the plaintiff to move to enter a verdict for him for an agreed sum, if upon the facts and findings of the jury the Court should be of opinion that the defendants had been guilty of negligence:—*Held*, that upon these findings the plaintiff was entitled to a verdict; for that, although it might not have been the duty of the defendants themselves to cause the truck to be properly examined and repaired upon its arrival at Peterborough junction, it was somebody's duty to do it, and the defendants were guilty of culpable negligence in not satisfying themselves that a proper examination had taken place before they allowed the truck to proceed. Richardson *v.* The Great Eastern Railway Company - 486

EXECUTION CREDITOR — *Interpleader Issue—Equitable Claim—Bankrupt contracting new Debts whilst trading with Consent of Trustee—32 & 33 Vict. c. 71, s. 26.*] Upon an interpleader issue, the Court will take notice of equitable rights,—Denman, J., doubting.—*Duncan* v. *Cashin* (Law Rep. 10 C. P. 554), followed. In 1870 E. was adjudicated a bankrupt, and was allowed by the trustee to carry on his business for the benefit of his creditors. In 1875, a creditor, whose debt had been contracted whilst, and who was ignorant of the circumstances under which, E. was so trading, obtained a judgment against him, under which the sheriff seized in execution furniture which E. had acquired by means of the profits of such trading. Upon an interpleader issue, in which the trustee was plaintiff and the execution-creditor defendant:—*Held*, upon the authority of *Troughton* v. *Gitley* (Amb. 629), that, as a Court of equity would, under the circumstances, decree the goods

EXECUTION CREDITOR—*continued.*
to be the goods of the execution creditor, the same result must follow upon an interpleader issue in a Court of law. Engelback v. Nixon - 645

EXECUTION OF WILL—Attestation - 701
See Devise to Children.

EXECUTOR—Action by—Damage to personal estate - - - - 189
See Action by Executor.

FACTORS ACTS—*Agent "intrusted with the Possession of Goods," within 5 & 6 Vict. c. 39—Agent a Broker and also a Warehouse-keeper, and Goods delivered to him in the latter Capacity.*] A warehouse-keeper who has goods deposited with him as such is not "an agent intrusted with the possession" of them, within the Factors Act, 5 & 6 Vict. c. 39, although he be also a broker, and is usually employed to sell the goods, but always upon specific instructions for that purpose received from the principal.—One Slee carried on the business of a sheep's wool broker in Liverpool, and also that of a warehouse-keeper. In his capacity of warehouse-keeper he was in the habit of receiving from the plaintiffs, merchants in London, bills of lading for sheep's wool and goat's wool to arrive in Liverpool, which when landed was deposited in his warehouses, under directions to send the plaintiffs a report and valuation, but he was not authorized to sell without specific instructions. The sheep's wool so deposited with him was usually sold by Slee, and the proceeds received by him for the plaintiffs. The goats' wool Slee never sold, he not being a goats' wool broker.—Having wools of the plaintiffs of both descriptions in his warehouse, but not having any instructions for the sale of either, Slee professed to pledge the whole with the defendants, bankers in Liverpool, by a letter in which he undertook to hold them as trustee for the defendants, to secure the sum advanced:—*Held*, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that Slee was not, as to any of the wools so agreed to be pledged, "an agent intrusted with the possession," within the Factors Act, 5 & 6 Vict. c. 39.—Per Blackburn, J.:—The intention of the Factors Act, 5 & 6 Vict. c. 39, was, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges them, he should be deemed by that act to have misled any one who bonâ fide deals with the agent, and makes a purchase from or an advance to him without notice that he was not authorized to sell the goods or to procure the advance. Per Bramwell, B.:—The statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed. Cole *v.* The North Western Bank - - - Ex. Ch. 354

FAILURE OF CONSIDERATION—*Sale of Leaseholds—Equity of Redemption—Covenant for Title—Money had and received.*] Leasehold premises were mortgaged by S., who subsequently married L. After the death of L., his executors concurred in a sale by the mortgagee to C., and received the balance of the purchase-money after payment of the mortgage-debt, interest, and expenses, and, in

FAILURE OF CONSIDERATION—*continued.*
the bonâ fide belief that L. was legally entitled to the equity of redemption, disposed of such balance as part of his estate. S., the widow of L., afterwards filed a bill against C., the purchaser, to recover the property, and obtained a decree against him for the value of the equity of redemption,—C. being treated as assignee of the mortgage:—*Held*, that C. could not recover back the money paid to the executors, as upon a failure of consideration; but must have recourse to his remedy upon the covenant for title, if any. Clare *v.* Lamb - - - - 334

—— Sale—Work and labour - - 271
See Property in Goods. 2.

FIRE INSURANCE—*Proviso that subsequent Insurance should be disclosed—Marine Policy, when Goods covered by — Goods in Stevedore's Warehouse.*] The plaintiffs effected a policy of insurance with the defendant as chairman of a fire insurance company for 3000*l.*, "on wool in bales or fleeces 'greasy' and 'washed,' in all or any shed or store, on station, or in transit to Sydney by land only, or in any shed or store, or any wharf in Sydney, until placed on ship." The policy contained a provision as follows:—"No claim shall be recoverable if the property insured be previously or subsequently insured elsewhere, unless the particulars of such insurance be notified to the company in writing." The plaintiffs subsequently effected an insurance with a Marine Insurance Company to cover 16,500*l.* upon wool, the risk being described as "at and from the River Hunter to Sydney per ships and steamers, and thence per ship or ships to London, including the risk of craft from the time that the wools are first waterborne and of transhipment or landing and re-shipment at Sydney." The frequent practice at the port of Sydney is that wool arriving there for shipment is not delivered direct to the ship for which it is intended, but is conveyed to the stores belonging to the persons who are acting as the stevedores of the ship, and is there pressed for the purpose of reducing its bulk. By the practice and course of business, the stevedore's receipt is regarded as between the ship and the shippers as equivalent to the mate's receipt, and bills of lading are given in exchange for it. Certain wool belonging to the plaintiffs was forwarded by several consignments by several steamers from the River Hunter to Sydney. The plaintiff's agent at Sydney had the wool conveyed on its arrival to his own stores, for the purpose of being weighed, and entered into a contract for its conveyance to London on board a ship. The wool was then conveyed from the warehouses to the stores of the stevedores of the ship, who gave the usual receipts for the same. While in the stevedores' warehouses, a portion of the wool was destroyed or damaged by a fire, and the plaintiffs sought to recover such loss upon the policy effected with the defendant's company. The company resisted the claim, upon the ground that the policy of marine insurance above mentioned came within the terms of the provision in the fire policy, and ought to have been communicated to them:—*Held*, that the marine policy did not cover the wool in the stevedore's warehouses, and was not such an insurance as the plaintiffs were

FIRE INSURANCE—*continued.*
bound under the provisions in the fire policy to notify to the defendant's company, and that the plaintiffs were therefore entitled to recover. The Australian Agricultural Company *v.* Saunders - - - - Ex. Ch. 668

FORBEARANCE TO DELIVER—Sale of goods 598
See Damages on Contract of Sale.

FOREIGN AVERAGE STATEMENT—*Marine Insurance*—"*General Average as per Foreign Statement*"—"*Warranted free from Average unless general*"—*Voyage broken up before Arrival at Port of Destination.*] A policy of insurance on a cargo of wheat shipped from Varna to Marseilles contained the usual memorandum against average unless general, and the following term, "general average as per foreign statement."—The ship, after starting from Varna, met with heavy weather, and was forced to carry a great press of canvas to avoid a lee shore. This caused her to strain very much, and having sprung a leak and become otherwise disabled, she was brought to the port of Constantinople. It was found, on a survey, that a fifth of the wheat had been damaged; and the surveyors recommended that the voyage should end at Constantinople, and the damaged part of the wheat should be sold, and the rest transhipped to Marseilles. It appeared that the repairs necessary for the ship would have taken from one to two months. Under these circumstances, the recommendation of the surveyors was carried out and an adjustment of average in respect of ship and cargo was made at Constantinople. In such adjustment the damage which the cargo of wheat had sustained was treated as general average, and in accordance with such average adjustment a certain sum of money became payable by the underwriters upon the policy. The law by which the adjustment ought to have been regulated according to the law and usages prevailing at Constantinople under the circumstances was the law of France, and the average adjustment was made up in all respects in conformity with such law. In an action on the policy by the owners of the wheat, the defendants paid into Court sufficient to cover the plaintiffs' claim on all the items of the average adjustment except the damage to the wheat which, by the law of England, would not under the circumstances be a general average loss:—*Held*, in a special case stated in the action (affirming the decision of the Court below) that the voyage was rightly brought to an end at Constantinople, and the average adjusted there, and that the defendants were liable in respect of the damage done to the wheat. Mavro *v.* Ocean Marine Insurance Company - - - Ex. Ch. 414

FOREIGNER—Security for costs - - 438
See Security for Costs.

FORFEITURE OF DEPOSIT—Sale of land 538
See Conditions of Sale.

FRANCHISE—Parliamentary - 285, 297
See Vote for Parliament. 1, 2.

FRAUD—Pleading - - - - 166
See Plea of Fraud.

FRAUDS, STATUTE OF—Interest in land - 402
See Contract by Corporation.

—— Sale of goods - - - - 598
See Damages on Contract of Sale.

FREIGHT—Insurance—Concealment **Ex. Ch. 179**
See Concealment of Material Fact.
—— Insurance—Loss - - **Ex. Ch. 125**
See Loss of Freight.
FRUSTRATION OF ADVENTURE—Charterparty
See Loss of Freight. [**Ex. Ch. 125**

GAME—Justices' jurisdiction—Claim of right
See Justices' Jurisdiction. [662
—— Searching on highway - - - 587
See Searching on Highway.
GENERAL AVERAGE—Foreign statement **Ex. Ch.**
See Foreign Average Statement. [414

"GOODWILL"—*Construction of Proviso in Lease of a Public-house—"Goodwill."*] In August, 1845, the defendant's testatrix granted to the plaintiff a lease of a public-house in London Road, Liverpool, for fourteen years, at a rent of 70*l.* per annum, the latter paying 300*l.* for the goodwill; and, before the expiration of that lease, viz. in March, 1858, she granted him a further lease for fourteen years at a rent of 80*l.* per annum. Each of these leases contained the following proviso:—"Provided also, and it is agreed and declared that, at the expiration or other sooner determination of the term hereby granted, all such sum and sums of money as shall or can be procured for the goodwill of the business of a licensed victualler in respect of the premises from an incoming tenant, shall be received by and belong to the lessee, his executors, &c."—The second lease being about to expire, negotiations took place between the plaintiff and the defendant for a renewal, but they failed to come to terms; and the defendant, with notice of the plaintiff's claim under the above proviso, granted a lease of the premises to a new tenant for a term of fourteen years, at a rent of 160*l.* per annum, and a premium of 1300*l.*—Upon a case stated for the opinion of the Court by an arbitrator, to whom it was to be referred to assess the amount of damages the plaintiff was entitled to recover for the breach (if any) of the above proviso, upon the principles to be laid down by the Court, it was found as a fact that "the rental of 160*l.* per annum reserved in the lease granted to the new tenant was, without any premium, bonus, or other payment whatever, a full and sufficient rental for the premises under such a lease, whether intended for a licensed victualler's business or not:" and, further, that "the goodwill of the business carried on by the plaintiff would, if belonging to the owner of the house, have had a very considerable value, and, if such owner had in that case been willing to grant a lease similar to that granted to the new tenant, a sum exceeding 1300*l.* would without difficulty have been obtained for the goodwill":—*Held*, that the proviso was broken; and that the arbitrator was to estimate the damages the plaintiff was entitled to recover for such breach, in the same manner as one accustomed to value "goodwill" as between outgoing and incoming tenant would estimate them, and in so doing was not to disregard the increased value of the property in the neighbourhood generally. Llewellyn *v.* Rutherford - - - - - 456

GRATING—Highway—Nuisance - - 658
See Nuisance in Highway.
HIGHWAY—Nuisance—Liability - - 658
See Nuisance in Highway.
—— Searching for game - - - 587
See Searching on Highway.
HORSE—Injury by horse - - - 10
See Trespass.
HUSBAND AND WIFE—Conveyance of land [472, 473, 667
See Conveyance by Married Woman. 1, 2, 3.
—— Separate estate - - - 497, 554
See Separate Estate of Wife. 1, 2.
IMPLIED INDEMNITY—Wrong to third person
See Indemnity. [196
IMPLIED WARRANTY—Cab - - 90
See Cab-owner.
INCUMBRANCE—Notice—Sale of land **Ex. Ch. 420**
See Notice of Incumbrance.

INDEMNITY — *Implied Contract of — Act done by one Person at another's Request injurious to a third Party.*] The plaintiffs were in possession of certain trucks, which were claimed by the defendant, and also by the proprietors of the K. P. Colliery. A correspondence took place between the plaintiffs and the defendant, in which the plaintiffs asked for an indemnity if they should deliver up the trucks to the defendant. The defendant, without giving any answer as to the indemnity, wrote requiring the plaintiffs to send the trucks back to him, which they thereupon did. The K. P. Colliery proprietors then brought an action against the plaintiffs for conversion of the trucks, and their claim proving well founded, the plaintiffs were obliged to pay a sum of money, in settlement of the action, which they sought to recover from the defendant upon a contract of indemnity:—*Held*, following the doctrine laid down in *Betts* v. *Gibbins* (2 Ad. & E. 57) and *Toplis* v. *Grane* (5 Bing. N. C. 636), that there was, under the circumstances of the case, evidence of an implied promise to indemnify.—The principle upon which in such cases a contract of indemnity is implied is not confined to cases of principal and agent, or employer and employed. Dugdale *v.* Lovering - - - - - 196

INFERIOR COURT—Judgment—Estoppel 29
See Estoppel by Judgment. 1.
INFRINGEMENT OF COPYRIGHT—Play 572
See Copyright in Play.
INNUENDO—Libel—Arrest of judgment - 502
See Libel.
INSOLVENCY—Rescission of contract - 15
See Rescission of Contract.
INSPECTION—Admission of possession of documents - - - - 692
See Production of Documents. 2.
—— Documents - - - - 222
See Production of Documents. 1.

INSURABLE INTEREST — *Marine Insurance—Commencement of Risk—Incomplete Cargo—Seaworthiness—Peril of the Sea—Evidence—Burthen of Proof.*] A ship whose cargo was insured by a marine policy, began suddenly to leak, and sank at her anchors in port during fine weather. In an action on the policy evidence was given on on the part of the assured tending to shew that the ship was seaworthy, viz. that she had not

INSURABLE INTEREST—*continued.*
long before been put in good repair, that surveys had been made of her just previously, and that she had behaved well on previous voyages and on her voyage to the port where she was lost. No evidence was given of any actual facts shewing the cause of her loss, although possible explanations of it, by way of conjecture, were suggested by the witness:—*Held* (affirming the decision of the Court below), that there was evidence of a loss by the perils insured against.—The plaintiff, a merchant in London, contracted with B. S. & Co., of Calcutta, for the purchase of rice as follows:—"Bought for account of A. of B. S. & Co., the cargo of new crop Rangoon rice, per *Sunbeam*, 707 tons register, at 9*s.* 1½*d.* per cwt. cost and freight. Payment by sellers' draft on purchasers, at six months' sight, with documents attached."—The *Sunbeam* was chartered by the sellers' agent to proceed to Rangoon to ship the cargo of rice. The plaintiff effected an insurance with the defendant as follows:—"At and from Rangoon, to any port in the United Kingdom or Continent, by the *Sunbeam*, on rice, as interest may appear," &c. While loading at Rangoon, and the greater part of the cargo having been shipped, but a substantial part still remaining to be shipped, the *Sunbeam* sank, and the rice already shipped was wholly lost. The captain afterwards signed bills of lading for the cargo shipped, which were indorsed to the plaintiff, and the sellers drew bills of exchange for the price of such cargo, which were accepted and met by the plaintiff:—*Held* (by Bramwell, B., Blackburn and Lush, JJ., and Pollock and Amphlett, BB., Quain, J., dissenting, reversing the decision of the Court below), that the plaintiff had no insurable interest in the rice, inasmuch as it was not at his risk under the contract of sale until the loading was complete. Anderson *v.* Morice - - 58, Ex. Ch. 609

INSURANCE—Fire—Disclosure of subsequent policy - - - Ex. Ch. 668
See Fire Insurance.

—— Life policy—Order and disposition - 319
See Order and Disposition.

—— Marine—Average—Foreign statement [Ex. Ch. 414
See Foreign Average Statement.

—— Marine—Concealment - - Ex. Ch. 179
See Concealment of Material Fact.

—— Marine—Insurable interest 58, Ex. Ch. 609
See Insurable Interest.

—— Marine—Loss of freight - Ex. Ch. 125
See Loss of Freight.

—— Marine—Seaworthiness - - 1
See Seaworthiness.

INTEREST IN LAND—Use of dock - 402
See Contract by Corporation.

INTERPLEADER—Equitable claim - 645
See Execution Creditor.

—— Equitable claims - - - 554
See Separate Estate of Wife. 1.

INTERRUPTION OF EASEMENT—*Light—Interruption not submitted to or acquiesced in—Prescription Act, 2 & 3 Wm. 4, c. 71, ss. 3, 4, 6.*] The twenty years' enjoyment which under s. 3 of 2 & 3 Wm. 4, c. 71, gives an absolute and indefeasible right to the access of light, need not be an enjoyment in

INTERRUPTION OF EASEMENT—*continued.*
fact "without interruption" for the period mentioned, but an enjoyment without *such* an interruption as is contemplated by s. 4, viz. "an interruption submitted to or acquiesced in by the party interrupted for one year" after notice.—And, in order to negative submission to or acquiescence in the interruption, it is not necessary that the party interrupted shall have brought an action or suit, or taken any active steps to remove the obstruction: it is enough to shew that he has in a reasonable manner communicated to the party causing the interruption that he does not really submit to or acquiesce in it.—Where, therefore, the plaintiff had for more than twenty years enjoyed the access of light to his workshop, through a window against which the defendant had about fourteen months before action brought erected a permanent building which obstructed it, and the plaintiff had taken no active measures to cause the obstruction to be removed, but had several times, himself or by his tenant, complained of and protested against it:—*Held*, that it was a question proper to be left to the jury whether or not there had been such a submission to or acquiescence in the interruption of the enjoyment as to deprive the plaintiff of the right to the light.—*Semble*, that the same sort of evidence of user or enjoyment need not be given in the case of a light as in the case of a claim of a right of way. Glover *v.* Coleman - - - - 108

JOINT CANDIDATURE—Agency - - 168
See Bribery. 2.

JOINT CONTRACT—Damages—Set-off of profit
See Damages on Joint Contract. [300

JUDGMENT—Estoppel - - 29, 154
See Estoppel by Judgment. 1, 2.

JURISDICTION—Justices—Claim of right 662
See Justices' Jurisdiction.

—— Justices—Seizure of game - - 587
See Searching on Highway.

—— Mayor's Court - - - 149, 689
See Cause of Action. 2, 3.

JUSTICES—Jurisdiction—Claim of right - 662
See Justices' Jurisdiction.

JUSTICES' JURISDICTION — *Game — Bonâ fide Claim of Right—Mens rea—1 & 2 Wm. 4, c. 32, s. 30.*] It is not sufficient to oust the jurisdiction of the justices in regard to a charge of trespass in pursuit of game under 1 & 2 Wm. 4, c. 32, that there is an honest claim of right if such claim is absurd and impossible in point of law. The question is whether a reasonable claim of right is involved, and not one of mens rea, inasmuch as the statute is not a mere criminal statute, but is intended for the protection of the peculiar rights of those entitled to shoot game. Watkins *v.* Major - - - - - - 662

—— Seizure of game - - - - 587
See Searching on Highway.

LAND ABROAD—Rent-charge—Action - 583
See Action for Rent-charge.

LANDLORD AND TENANT—Covenant not to assign - - - - 342
See Covenant not to assign.

—— Notice to quit - - - - 377
See Notice to Quit.

LANDLORD AND TENANT—*continued.*

—— Nuisance—Highway - - - 658
See Nuisance in Highway.

LANDS CLAUSES ACT, 1845, s. 133 - 76
See Assessment to Poor-rate.

LIBEL—*Innuendo—Arrest of Judgment—Damages.*] In a periodical publication circulating amongst booksellers and stationers, the proprietor, by a mistake in the arrangement of the *London Gazette* announcements, inserted the names of the plaintiff's firm (who were stationers) under the head "First Meetings under the Bankruptcy Act," instead of under "Dissolutions of Partnerships."—In a count for libel, the innuendo was, "meaning thereby that the plaintiff had been bankrupt or had taken proceedings in liquidation or for composition." The jury having found the publication libellous, and having assessed the damages at 50*l.*:—The Court refused to arrest the judgment or to interfere with the finding. Shepheard *v.* Whitaker - - - - - - 502

LIEN—Solicitor's - - - - 397
See Solicitor's Lien.

LIFE INSURANCE—Policy—Order and Disposition - - - - - 319
See Order and Disposition.

LIGHT—Interruption—Acquiescence - 108
See Interruption of Easement.

LIMITATIONS, STATUTE OF—Fresh promise [497
See Separate Estate of Married Woman. 2.

LORD MAYOR'S COURT—Jurisdiction 149, 689
See Cause of Action. 2, 3.

—— Prohibition—Costs - - - 607
See Costs of Prohibition.

—— Prohibition—Declaration - - 379
See Prohibition, Declaration in.

LOSS OF FREIGHT—*Marine Insurance—Delay through Perils of the Sea—Frustration of Adventure—Right of Charterer to refuse to load.*] The plaintiff, a shipowner, in November, 1871, entered into a charterparty, by which the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. The plaintiff effected an insurance on the chartered freight for the voyage. The ship sailed from Liverpool on the 2nd of January, 1872, and on the 3rd got aground in Carnarvon Bay. She was got off by the 18th of February and repaired, the time necessary for the completion of such repairs extending to the end of August. In the meantime, on the 15th of February, the charterers had thrown up the charter and chartered another ship to carry the rails (which were wanted for the construction of a railway) to San Francisco. In an action by the plaintiff on the policy of insurance on the chartered freight, the jury found that the time necessary for getting the ship off and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers:—*Held*, by Bramwell, B., Blackburn, Mellor, and Lush, JJ., and Amphlett, B. (Cleasby, B., dissenting), affirming the decision of the Court below, that the

LOSS OF FREIGHT—*continued.*

charterers were, by reason of the delay, not bound to load the ship, and that there was therefore a loss of the chartered freight by perils of the sea. Jackson *v.* Union Marine Insurance Company, Limited - - - - Ex. Ch. 125

MANCHESTER IMPROVEMENT ACT—30 *Vict. c. xxxvi, s.* 38—*Construction—Dangerous Buildings—Conclusiveness of Certificate of City Surveyor—Ratification by Corporation of Acts of its Officers—Sufficiency of Notice.*] The 38th section of the Manchester Improvement Act, 30 Vict. c. xxxvi., enacts that, "if the surveyor of the city, or, in his absence, any other duly qualified surveyor, shall certify in writing that there is imminent danger from any building, the corporation shall and may, without any presentment, notice, or other formality, cause the same to be taken down either wholly or in part, or to be repaired or secured in such manner as the corporation shall think requisite;" and by s. 39 the expenses incurred are recoverable from the owner.—The city surveyor having certified that there was imminent danger from a building of which the plaintiff was the owner and occupier, the town-clerk, assuming to act on behalf of the corporation, issued a direction to the surveyor "to cause the building mentioned in his certificate to be taken down or repaired in such manner as he should think requisite." The surveyor thereupon employed a builder to take down and rebuild certain parts of the building, who was paid by the corporation for so doing; and the corporation afterwards recovered the amount from the plaintiff:—*Held*, that the certificate of the surveyor was conclusive, and could not be questioned in an action to recover back the money so paid.—*Held*, also, that the acts of the surveyor, authenticated by the town-clerk, were the acts of the corporation; or that, at all events, they were ratified and adopted by them so as to justify what was done under the certificate.—The certificate and notice referred generally to the "building," No. 95, Market Street: the premises dealt with consisted, besides No. 95, Market Street, of other premises adjoining thereto, being No. 2, Palace Street, for which the plaintiff was separately rated, but connected therewith by internal communications, and occupied therewith by him as one set of business premises:—*Held*, that the description in the certificate and notice was sufficient to cover both sets of premises. Cheetham *v.* Mayor, &c., of the City of Manchester - - - - - 249

MARINE INSURANCE—Average—Foreign statement - - - Ex. Ch. 414
See Foreign Average Statement.

—— Concealment - - - Ex. Ch. 179
See Concealment of Material Fact.

—— Goods in stevedores' warehouse Ex. Ch. 668
See Fire Insurance.

—— Insurable interest - 58, Ex. Ch. 609
See Insurable Interest.

—— Loss of freight - - - Ex. Ch. 125
See Loss of Freight.

—— Seaworthiness - - - - 1
See Seaworthiness.

MARRIED WOMAN—Conveyance of land [472, 473, 676
See Conveyance by Married Woman. 1, 2, 3.
—— Separate estate - - 497–554
See Separate Estate of Wife. 1, 2.

MASTER OF SHIP—Bill of lading - 562
See Bills of Lading Act.

MAYOR'S COURT—Jurisdiction - 149, 689
See Cause of Action. 2, 3.
—— Prohibition—Costs - - - 607
See Costs of Prohibition.
—— Prohibition—Declaration - - 379
See Prohibition, Declaration in.

MEASURE OF DAMAGE—Sale of goodwill—Public-house - - - 456
See Goodwill.
—— Joint contract - - - - 300
See Damages on Joint Contract.
—— Sale—Postponement - - - 598
See Damages on Contract of Sale.
—— Sale of land - - - - 538
See Conditions of Sale.

MENS REA—Game—Claim of right - 662
See Justices' Jurisdiction.

MILITIA SERGEANT—Occupation as tenant
See Vote for Parliament. 1. [285

MISTAKE OF ARBITRATOR—*Arbitration—Mistake of Law—Application to send back Award—Compulsory Reference.*] An award will not be sent back to the arbitrator on the ground that he has made a mistake in the legal principle upon which his award is based, except where the arbitrator himself admits the mistake. Dinn *v.* Blake [388

MISTAKE OF LAW—Arbitration - - 388
See Mistake of Arbitrator.

MONEY HAD AND RECEIVED—Failure of consideration - - - - 334
See Failure of Consideration.
—— Failure of consideration - - 271
See Property in Goods. 2.

MOORINGS IN THAMES—Poor-rate - 504
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MUNICIPAL ELECTION—Ballot paper - 733
See Ballot Paper.
—— Bribery - - - - - - 591
See Bribery. 1.
—— Costs of petition - - - 726
See Costs of Election Petition.
—— Double nomination - - - 476
See Nomination.
—— Polling station - - - - 209
See Polling Station.
—— Respondent to petition - - - 711
See Respondent to Election Petition.

NEGLIGENCE—Railway company - 49, 486
See Evidence of Negligence. 1, 2.

NEW RIVER COMPANY'S ACT, 1852, s. 46 442
See Assessment to Water-rate.

NEXT PRESENTATION—Simory - - 518
See Simony.

NOMINATION—*Municipal Election Petition—Double Nomination—Ballot Act*, 1872 (35 & 36 *Vict. c.* 33)—*Defect in Nomination.*] A candidate at a municipal election was twice nominated, one nomination being good, but the other being bad. His name appeared in the ballot papers twice, once in respect of each nomination. 71 voters appended their marks to his name under one nomination, and 301 under the other. All the voters so voting intended to vote for the candidate, and if both classes of voters could be added together, he had a majority, and was entitled to be returned:—*Held*, that having been duly nominated, and having a majority of votes, he was entitled to be returned.—*Held*, also, that the defect in the bad nomination was not cured by the 12th and 13th rules of the 1st schedule of the Ballot Act, inasmuch as those rules do not apply to the nomination at a municipal election. Northcote *v.* Pulsford - - - - 476

NON-JOINDER—Amendment—Costs - 203
See Costs under County Courts Act. 2.

NOTICE OF ASSIGNMENT—Life policy - 319
See Order and Disposition.

NOTICE OF INCUMBRANCE—*Vendor and Purchaser—Sale of Real Property—Incumbrances—Terms of existing Tenancies, Notice of—Agreements collateral to Tenancies.*] Part of an estate consisted of three farms in Hampshire, and, in that county, valuations between outgoing and incoming tenants for hay, straw, and manure, are made at "fodder value," which is lower than what is called "market value." The three tenants of the farms held under verbal agreements, from year to year, according to the custom of Hampshire. The defendants were devisees of the estate in trust for sale, and, in contemplation of a sale, they gave notice to the tenants to quit at Michaelmas, 1869. The tenants alleged that they had been promised leases by the devisor, and although there was nothing to shew that such promises were binding in law or equity, the defendants, thinking the claim binding in honour and conscience, entered into agreements with the tenants, by which, in consideration of their giving up possession of their farms according to the notices, the defendants promised to remit the half-year's rent due at Michaelmas, 1868, to pay 100*l.* to the tenant, and to pay for hay, &c., at the termination of the tenancy, at "market value." In June, 1868, the estate was put up for sale by auction. In the particulars and conditions of sale the three farms were described as in the occupation of the tenants respectively till Michaelmas, 1869, at certain rents, and certain incumbrances, subject to which the sale was made, were specified, viz. land-tax and tithe rent-charge; but no express mention was made of the above-mentioned agreements with the tenants. The conditions stipulated that the property should be taken to be correctly described as to quantity and otherwise, and that if any error, misstatement, or omission should be discovered, the same should not annul the sale, nor should any compensation be allowed, and that the rent or possession should be received or retained and the outgoings discharged by the vendors up to the 29th of September, and from that day by the purchaser. The property was bought in at the sale by auction, and afterwards sold by private contract on the 18th of July, 1868,

NOTICE OF INCUMBRANCE—*continued.*
to the plaintiff. The contract described the property as in the foregoing particulars, and as being purchased subject to the foregoing conditions. At the time of the purchase the plaintiff had no knowledge of the above-mentioned agreements with the tenants. Upon his becoming aware of and objecting in respect of them, it was agreed that he should complete without prejudice to his claim to be indemnified in respect of the agreements to pay market value for the hay, &c. The plaintiff afterwards paid the tenants the amount of the valuations of hay, &c., at market value, and now sought to recover the difference between that and fodder value from the defendants:—*Held* (reversing the decision of the Court below; Amphlett, B., dissenting), that the agreements with the tenants to pay market value were collateral agreements binding only on the defendants personally, and did not amount to fresh demises; and that by the arrangement between the parties, the plaintiff, having paid the tenants' claims, could recover the difference between market and fodder value from the defendants as money paid for their use.—Per Amphlett, B., the agreements amounted to fresh devises, as to which there was no duty cast upon the defendants to disclose the terms of them to the plaintiff, and as to which a Court of equity would not enforce compensation against the vendors; and, consequently, that the action was not maintainable. Phillips *v.* Miller [Ex. Ch. 420

NOTICE OF OBJECTION—Service - - 297
See Vote for Parliament. 2.

NOTICE TO QUIT — *Landlord and Tenant — Tenancy from Year to Year—Commencement of Tenancy.*] A written agreement for the letting of certain premises expressed the tenancy to be "for a year certain, and so on from year to year until a half-year's notice should be given by or to either party, at a yearly rent of 50*l.* payable quarterly, the first payment to be on the 25th of March next." The agreement was dated the 20th of December, 1872, and specified no date for the commencement of the term:—*Held*, that a notice to quit given by the landlord on the 24th of June, 1874, was a good notice. Sandhill *v.* Franklin [377

NUISANCE—Highway—Landlord - - 658
See Nuisance in Highway.

NUISANCE IN HIGHWAY—*Leaving an insecure Grating in a public Foot-path — Landlord and Tenant.*] A. was injured by the giving way of a grating in a public foot-way, which was used for a coal-shoot and for letting light into the lower part of premises adjoining. These premises were at the time of the accident under lease to B., who covenanted to repair and keep in repair all except the roofs, main walls, and main timbers. At the time of the demise the grating was unsafe; but there was no evidence that C., the landlady, had any knowledge of its unsafe state; and the jury found that no blame was attributable to her for not knowing it:—*Held*, upon the authority of *Pretty* v. *Bickmore* (Law Rep. 8 C. P. 401), that no action was maintainable against C.—At the time of the accident, A. was not passing along the way, but was standing on the grating to talk with a person at a window above it:—*Held*, that A. was not making an improper use of the grating. Gwinnell *v.* Eamer - - - - 658

OBJECTION, NOTICE OF—Service - 297
See Vote for Parliament. 2.

OCCUPATION AS TENANT—Franchise - 285
See Vote for Parliament. 1.

OFFER—Acceptance—Contract - - 102
See Acceptance of Offer.

ORAL EXAMINATION BEFORE MASTER — *Common Law Procedure Act*, 1854 (17 & 18 Vict. c. 125), *s.* 46—"*Hearing of any Motion.*"] The 46th section of the Common Law Procedure Act, 1854, enacts that "upon the hearing of any motion or summons," it shall be lawful for the Court or a judge at their or his discretion from time to time to order the production of documents or the oral examination of witnesses, before such Court or judge or before a master:—*Held* (by Lord Coleridge, C.J., Keating and Denman, JJ.; Grove, J., doubting), that the terms "hearing of any motion" included the application for a rule nisi, and, consequently, that an order for the examination of witnesses might be made upon a motion for an attachment against a defendant for not answering interrogatories.—*Thomas* v. *Stutterheim* (5 W. R. 6) distinguished. Morgan *v.* Alexander 184

ORDER AND DISPOSITION—*Bankruptcy—Life Policy in the Order and Disposition of the Bankrupt—Notice of Assignment to the Office.*] In 1845 R. effected a policy for 1000*l.* upon his life, and assigned it by way of mortgage to G. In 1858, W. (who was G.'s attorney) went to the office to pay a premium and to confer with the secretary upon other business connected with the office, and then informed him of the assignment. In 1862 R. became a bankrupt, and he died in 1871. After the death of R. the office for the first time had notice of his bankruptcy:—*Held*, —upon a special case, the Court to draw inferences of fact,—that the conversation between W. and the secretary in 1858 was a sufficient notice to the office that the policy had been assigned and was not in the order and disposition of R.; the statute requiring such notices to be in writing not being at that time in existence. Alletson *v.* Chichester - - - - - 319

PARLIAMENT—Election - 285, 297
See Vote for Parliament. 1, 2.

—— Election—Joint candidature—Agency 168
See Bribery. 2.

PARLIAMENTARY ELECTION—Polling station
See Polling Station. [209

PAYMENT—Bill—Authority to draw - 630
See Authority to draw Bill.

—— Bill of exchange—Set-off - - 695
See Equitable Set-off.

PENALTY—Several offences—Bribery - 591
See Bribery. 1.

PLAY—Copyright—Infringement - - 572
See Copyright in Play.

PLEA OF FRAUD—*Pleading—Disaffirmance of Contract.*] To a declaration on a cheque the defendant pleaded that he was induced to sign

PLEA OF FRAUD—*continued.*
the cheque by the fraud of the plaintiff:—*Held* that the plea imported an allegation that the defendant, on discovering the fraud, disaffirmed the contract, and that the defendant was not entitled to a verdict on a traverse of the plea, it appearing that he had not disaffirmed the contract. DAWES *v.* HARNESS - - - 166

PLEADING—Plea of fraud - - - 166
See PLEA OF FRAUD.

—— Probate—Estoppel - - - 154
See ESTOPPEL BY JUDGMENT. 2.

POLLING STATION—*Parliamentary and Municipal Elections—Right of Candidate to be present in Polling Station—Ballot Act*, 35 & 36 *Vict. c.* 33, *s.* 9—*Rules* 21 *and* 51.] A candidate at a parliamentary or municipal election has a general right to be present in a polling station at the election, and not merely a qualified right to be present for the purpose of undertaking the duties of an agent, or of assisting his agent. CLEMENTSON *v.* MASON - - - - - - - 209

POOR-RATE—Assessment—Deficiency - 76
See ASSESSMENT TO POOR-RATE. 2.

—— Assessment—Moorings in Thames - 504
See ASSESSMENT TO POOR-RATE. 1.

PRACTICE—Appeal from Chambers - 474
See APPEAL FROM CHAMBERS.

—— Cost—Certificate - - 92, 203
See COSTS UNDER COUNTY COURTS ACTS. 1, 2.

—— Costs—Certificate - - - 29
See ESTOPPEL BY JUDGMENT. 1.

—— Counsel's fees—Refresher - - 152
See REFRESHER.

—— Inspection - - - - 692
See PRODUCTION OF DOCUMENTS. 2.

—— Oral examination before master - 184
See ORAL EXAMINATION BEFORE MASTER.

—— Pleading—Plea of fraud - - 106
See PLEA OF FRAUD.

—— Prohibition—Costs - - - 607
See COSTS OF PROHIBITION.

—— Prohibition—Declaration - - 379
See PROHIBITION, DECLARATION IN.

—— Security for costs - - - 438
See SECURITY FOR COSTS.

—— Service out of jurisdiction - - 48
See CAUSE OF ACTION. 1.

PRESCRIPTION ACT, ss. 3, 4, 6 - - 108
See INTERRUPTION OF EASEMENT.

PRESENTMENT OF CHEQUE—No effects - 689
See CAUSE OF ACTION. 3.

PRINCIPAL AND AGENT—Factors Acts
See FACTORS ACTS. [Ex. Ch. 354

—— Indemnity - - - - 196
See INDEMNITY.

PRODUCTION OF DOCUMENTS—*Libel—Discovery and Inspection of Documents under* 14 & 15 *Vict. c.* 99, *s.* 6, *and s.* 50 *of the Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125)]. The power of the Court to grant inspection under 14 & 15 Vict. c. 99, s. 6, is limited to cases where a bill for discovery in equity could be maintained.—The plaintiff, who had been in the domestic service of the defendants, left their service, and obtained an engagement with one H. The female defendant wrote a letter to H. which induced him to decline to take the plaintiff into his service, and H. returned the letter to the writer. The plaintiff, assuming that the letter contained libellous matter concerning him, brought an action, and, upon an affidavit that he believed the letter to be a libel, and that it was necessary for the conduct of his case that he should have inspection of it, took out a summons calling upon the defendants to shew cause why he should not be at liberty to inspect it and take a copy. Upon the hearing of the summons, it was objected on the part of the defendants that it was not competent to the judge to make the order prayed, inasmuch as it would be calling upon the defendants to produce that which might render one of them liable to a criminal prosecution. Bramwell, B., thereupon, as a condition of his refusing to make an order for inspection, required the female defendant to make an affidavit that the letter, if produced, would tend to criminate her. The defendants' counsel declining to produce such an affidavit, the order for inspection was made.—Upon a motion to rescind this order:—*Held*, by Lord Coleridge, C.J., and Grove, J.,—Brett, J., dissenting,—that, inasmuch as the letter was relied on to support the plaintiff's case, and therefore, if material at all, must necessarily tend to lay the female defendant open to a criminal charge, discovery of it could not have been obtained by a bill for discovery or a motion for inspection in equity (because the bill would have been demurrable), and consequently that the order was one which the judge had no power under either 14 & 15 Vict. c. 99, s. 6, or 17 & 18 Vict. c. 125, s. 50, to make.—*Semble*, per Brett, J., that, although a party cannot be compelled to criminate himself by answer to interrogatories or production of a document, it is neither unfair nor unjust to call upon him to take the objection by affirming upon oath that his answer will (or may) tend to criminate him, and therefore that the condition was one which the judge under the latter part of s. 50 of the Common Law Procedure Act, 1854, might properly in his discretion impose.—*Held*, by Lord Coleridge, C.J., and Grove, J.,—Brett, J., dissenting,—that s. 6 of 14 & 15 Vict. c. 99 is not altered or extended in its import by ss. 50 and 51 of the Common Law Procedure Act, 1854.—*Held*, also, by Lord Coleridge, C.J., and Grove, J., that, although, in an application for inspection under 14 & 15 Vict. c. 99, s. 6, only, the power of the Courts of common law is limited by the practice of the Courts of equity; yet, where the application is for discovery under s. 50 of the Act of 1854, the power of the Courts of common law is not so limited.—*Held*, by Brett, J., that the power of the Court is not now limited, either in allowing interrogatories, discovery, or inspection of documents, by any reference to the former or present power or practice of the Courts of equity on a bill of discovery; and that therefore it is no valid objection to such an order that, if the facts relied upon by the applicant had appeared on the face of a bill for discovery in equity, the bill

PRODUCTION OF DOCUMENTS—*continued.*
would have been demurrable, or that no order for inspection would have been made.—And *semble*, per Lord Coleridge, C.J., that the plaintiff in the present case might have obtained inspection of the letter in question by pursuing the course of procedure pointed out by s. 50 of the Common Law Procedure Act, 1854.—Distinction between discovery and inspection under 14 & 15 Vict. c. 99, s. 6, and 17 & 18 Vict. c. 125, s. 50, and interrogatories under s. 51 of the last-mentioned Act. Hill *v.* Campbell and Wife - 222

2. —— *Practice—Inspection of Documents admitted to be in the Defendant's Possession or Power.*] Where, in answer to interrogatories, the defendant admits that he has certain documents in his custody, possession, or power, it is not competent to him, upon an application for leave to inspect and take copies of them, to urge that others have an interest in them, and therefore he cannot produce them. Plant *v.* Kendrick 692

PROHIBITION—Costs - - - 607
See Costs of Prohibition.

—— Declaration - - - - 379
See Prohibition, Declaration in.

PROHIBITION, DECLARATION IN—*Prohibition—Mayor's Court—Right to a Declaration in Prohibition—Discretion.*] Where a superior Court is clearly of opinion, both with reference to the facts and the law, that an inferior Court is exceeding its jurisdiction, it is bound to grant a writ of prohibition; whether the applicant for the prohibition is the defendant below or a stranger. In such a case, neither the smallness of the claim in the suit below nor delay on the part of the applicant is a reason for refusing the writ. The plaintiff in the inferior court has in no case an absolute right to have the plaintiff in prohibition put to declare in prohibition. Worthington *v.* Jeffries - - - - - 379

PROPERTY IN GOODS—*Sale of Goods—Cash against Bill of Lading—Bill of Lading Deliverable to Order of Vendor—"Free on Board"—Goods shipped in Purchaser's Sacks—Part Payment—Intention.*] By a contract for the sale of potatoes they were to be shipped by the vendor for London, free on board at Dunkirk, and the price was to be paid in cash against bill of lading. It was also stipulated that there should be a part payment of the price by way of earnest. The potatoes were shipped under the contract in sacks provided by the purchaser, and were made by the bill of lading deliverable to the order of the vendor. The purchaser made a part payment of the price, in pursuance of the contract, and the vendor sent a draft for the balance of the purchase-money to his agent in England with the bill of lading which he indorsed to such agent for presentation to the purchaser. Upon the arrival of the ship at her destination, the vendor's agent presented the draft to the purchaser for acceptance, but the purchaser being under the impression that the shipment was short by sixteen sacks would not accept at once for the full amount, but offered to accept as soon as the vessel should be unloaded if the quantity was correct, or to pay the balance at once, deducting for the deficiency. The vendor's agent insisted

PROPERTY IN GOODS—*continued.*
on immediate acceptance for the full amount and, the purchaser not immediately accepting, sold the potatoes. In an action by the purchaser against the vendor's agent for a conversion of the potatoes:—*Held*, that the property in the goods had passed to the plaintiff, and that he was entitled to maintain the action. Ogg *v.* Shuter - - - - - 159

2. —— *Contract for Work to be done upon a Ship—Property in Articles manufactured for the Purposes of such Contract—Payments during the Progress of the Work—Completion of Contract prevented by Loss of the Ship—Money had and received—Failure of Consideration.*] The defendants contracted with the plaintiffs to make and supply new boilers and certain new machinery for a steamship of the plaintiffs, and to alter the engines of such steamship into compound surface condensing engines, according to a specification.—The engines, boilers, and connections were, by the contract, to be completed in every way ready for sea so far as specified, and tried under steam by the engineers (the defendants) previous to being handed over to the company; the result of such trial to be to the satisfaction of the company's inspector.—The price of the work was to be 5800*l.*, and was to be paid as the work progressed, in the following manner, viz. 2000*l.* when the boilers were plated, and 2000*l.* when the whole of the work was ready for fixing on board, and the balance, 1800*l.*, when the work was fully completed and tried under steam. These payments were only to be made on the certificate of the plaintiffs' inspector. The old materials removed from the ship were to become the property of the defendants. The specification contained elaborate provisions as to the fitting and fixing the new boilers and machinery on board the ship, and the adaptation of the old machinery to the new. The boilers and other new machinery contracted for were completed, and ready to be fixed on board, and one instalment of 2000*l.* had been paid under the contract, when the ship was lost by perils of the sea.—The value of the work actually done by the defendants under the contract amounted to 4118*l.* The second instalment of 2000*l.* was subsequently paid, at the time of which payment the plaintiffs knew of the loss of the ship, but the defendants did not.—The plaintiffs claimed delivery of the boilers and other machinery completed under the contract, and this being refused, brought an action for the detention of the same, or to recover back the 4000*l.* paid by them to the defendants:—*Held*, that the contract was an entire and indivisible contract for work to be done upon the plaintiffs' ship for a certain price, from further performance of which both parties were released by the loss of the ship; that the property in the articles manufactured was not intended to pass until they were fixed on board the ship; and that consequently the plaintiffs were not entitled to the boilers and machinery, nor could they recover the 4000*l.* already paid as upon a failure of consideration. Anglo-Egyptian Navigation Company *v.* Rennie - - 271

PUBLIC-HOUSE—Sale of goodwill - - 456
See Goodwill.

QUARE IMPEDIT—Simony - - - 518
See Simony.

RAILWAY COMPANY—Advice note—Estoppel
See Estoppel by Conduct. [307
—— Death of passenger—Executor - 189
See Action by Executor.
RAILWAYS CLAUSES ACT, 1845, ss. 140, 142
See Assessment to Water-rate. [442
RATES—Assessment—Moorings in Thames 504
See Assessment to Poor-rate. 1.
—— Deficiency—Liability to make good - 76
See Assessment to Poor-rate. 2.
—— Water-rate—Enforcement - - 442
See Assessment to Water-rate.
RATIFICATION—Corporation - - 249
See Manchester Improvement Act.
RECEIPT OF RENT—Waiver of breach of covenant - - - - - 342
See Covenant not to assign.
RECOVERY OF RATE—Water-rate - 442
See Assessment to Water-rate.
REFRESHER—*Practice—Costs—Counsel's Fee.*] In the Court of Common Pleas the rule as to the allowance of fees as refreshers on taxation of costs will in future be the same as in the Queen's Bench and Exchequer, viz. that such fees when proper may be allowed. Laurie *v.* Wilson 152
RELEASE—Pleading—Estoppel - - 154
See Estoppel by Judgment. 2.
RENT-CHARGE—Action—Land abroad - 583
See Action for Rent-charge.
REPAIR OF SHIP—Engines—Property passing
See Property in Goods. 2. [271
REPUTED OWNERSHIP—Bankruptcy - 319
See Order and Disposition.

RESCISSION OF CONTRACT—*Sale of Goods—Insolvency—Rescission.*] The defendants had, on the 5th of February, sold to the plaintiffs 200 tons of iron, to be delivered twenty-five tons monthly at 5*l.* per ton, net cash, or by four months bill with 2*s.* 6*d.* per ton added. By the usage of trade no delivery was due under this contract till the 1st of April. On the 12th of March the plaintiffs found themselves to be insolvent, and they gave notice of the fact to the defendants. On the 16th of March they filed a petition in the bankruptcy court for liquidation by arrangement or composition. The usual course of business under previous contracts between the parties of a similar description was for the defendants to deliver upon such contracts without further demand of delivery. No delivery, however, was made by the defendants or claimed by the plaintiffs in April. On the 5th of April, at the first meeting of the creditors, a resolution was passed to accept a composition of five shillings in the pound. Though the existence of the contract was mentioned at the meeting, no mention was made of it in the written statement of the plaintiffs' affairs. No step was taken in relation to the contract by either party until the 13th of May, when the market for iron having risen, the plaintiffs claimed the delivery of iron in fulfilment of the contract, offering and being ready to pay cash for it. The defendants replied, stating that

RESCISSION OF CONTRACT—*continued.*
the plaintiffs having failed to perform their part of the contract there was an end of it. The plaintiffs thereupon brought an action against the defendants for non-delivery of the iron:—*Held*, that the effect of the facts was that there had been a rescission of the contract before the 13th of May, the conduct of the plaintiffs having been such as to justify the defendants in the belief that the plaintiffs intended to abandon the contract upon their insolvency, and there being evidence that the defendants in such belief had likewise abandoned it.—*Ex parte Chalmers* (Law Rep. 8 Ch. 289) followed. Morgan *v.* Bain 15
—— Fraud - - - - - - 166
See Plea of Fraud.
—— Goods not equal to sample - - 391
See Sale by Sample.

RESPONDENT TO ELECTION PETITION—*Corrupt Practices (Municipal Elections) Act*, 1872, 35 & 36 *Vict. c.* 60, *s.* 13, *&c.—Parties to Petition—Unsuccessful Candidate not to be made a Respondent against his Will.*] At a municipal election A., B., and C. coalesced for the purpose of canvassing the burgesses. A. and B. were elected, C. was not. A petition was presented against the return of A. and B., and C. was joined as a respondent. At the trial, C., by his counsel, objected to be a respondent; but the commissioner allowed the trial to proceed upon the petition as presented, and in the result he found that A. had been guilty of personal bribery, and that B. and C. had been guilty of bribery through their agents.—Upon a special case stated for the opinion of the Court:—*Held*, that C. was not properly made a respondent. Lovering *v.* Dawson (No. 1.) - - - - - 711

RISK—Commencement—Insurable interest 58,
See Insurable Interest. [Ex. Ch. 609

SALE BY SAMPLE—*Goods not equal to Sample—Rejection by Purchaser—Purchaser not bound to send back the Goods.*] Where goods were sold by sample, and the bulk was found by the purchaser on inspection after delivery not to be equal to sample:—*Held*, that the purchaser might reject the goods by giving notice to the vendor that he would not accept them, and that they were at the vendor's risk, and was not bound to send back, or offer to send back, the goods to the vendor, or to place them in neutral custody. Grimoldby *v.* Wells - - 391

SALE OF GOODS—Insolvency—Rescission 15
See Rescission of Contract.
—— Passing of property - - 159, 271
See Property in Goods. 1, 2.
—— Postponement—Damages - - 598
See Damages on Contract of Sale.
—— Sample—Right to reject - - 391
See Sale by Sample.

SALE OF LAND—Forfeiture of deposit - 538
See Conditions of Sale.
—— Measure of damage - - - 538
See Conditions of Sale.
—— Notice of tenancies - - Ex. Ch. 420
See Notice of Incumbrance.

SALE OF LAND—Want of title—Failure of consideration - - - - 334
See Failure of Consideration.

SAMPLE—Sale of goods—Right to reject - 391
See Sale by Sample.

SEARCHING ON HIGHWAY—*Game—Seizure on Highway—25 & 26 Vict. c. 114, s. 2.*] In order to give jurisdiction to magistrates to convict of an offence under 25 & 26 Vict. c. 114. s. 2, it is necessary that the game or instruments for kill ng or taking game should be seized and detained on the highway.—*Clarke* v. *Crowder* (Law Rep. 4 C. P. 638) followed. Turner *v.* Morgan - 587

SEAWORTHINESS — *Marine Insurance — Deck Cargo.*] The warranty of seaworthiness implied in a contract of marine insurance is a warranty that the ship is seaworthy for the purposes of the particular subject-matter of the insurance. Therefore. in the case of a policy of insurance on deck cargo, it is not a compliance with the warranty of seaworthiness that the ship is fit to encounter ordinary rough weather with safety to herself because the deck cargo is such as may be readily jettisoned in such weather. Daniels *v.* Harris 1

—— Ship sinking at anchor - 58, Ex. Ch. 609
See Insurable Interest.

SECURITY FOR COSTS—*Plaintiff a Foreigner, but occasionally residing in England.*] Pending a reference. the plaintiff, a foreigner whose domicil was in Holland, but who for some years had occasionally resided at a furnished lodging in London, went abroad. During his absence from this country, the defendant obtained an order for security for costs:—The Court refused to rescind the order, upon an affidavit that the plaintiff had returned to England, and intended to remain there until the final settlement of the action. Westenberg *v.* Mortimore - - - 438

SEPARATE ESTATE OF WIFE—*Husband and Wife—Goods bought with her Separate Income—Interpleader Summons—Equitable Claims.*] The savings of a married woman's separate estate, like the income itself, become her separate estate in equity.—Furniture was settled upon a married woman to her separate use, and with money also her separate property she from time to time renewed such as wore out. The whole were seized by the sheriff for a debt of her husband:—*Held*, that, as a Court of equity would under the circumstances have restrained the sheriff from selling the accretions as well as the original furniture, a Court of law, upon an interpleader summons, must take notice of the equitable claim of the wife's trustee, and direct the sheriff to withdraw. Duncan *v.* Cashin - - - - 554

2. —— *Married Woman—I. O. U. given after Husband's Death, for Money of Wife lent during his Life-time—Statute of Limitations—Consideration for fresh Promise—Forbearance to sue.*] The plaintiff, a married woman, had lent the defendant 20*l.* (her own money) during her husband's life-time, for which the defendant, shortly after the husband's death, viz. on the 16th of July, 1867, gave the plaintiff an I. O. U. On the 12th of October, 1870, the defendant wrote to the plaintiff's agent,—"Yours of the 10th instant received, respecting Mrs. W.'s claim upon me. It is totally out of my power at the present time to liquidate the whole or even part of the same. I am in the anticipation of a better position, and, should I be successful, Mrs. W.'s claim shall have my first consideration. Meanwhile. I shall be pleased to pay a reasonable interest on the amount. Shew this letter to Mrs. W., and tell her the claim has not been forgotten by me, and shall be liquidated at the earliest opportunity possible:" and on the 6th of March, 1871. the defendant again wrote,—"At present it is utterly out of my power to do anything. I am willing to endeavour to pay it [the debt] off by easy instalments; or I am willing to pay you any reasonable interest to let the matter remain for the present," &c.—In an action for money lent, with a count upon a promise to pay in consideration of the plaintiff's forbearance to sue upon the I.O.U:—*Held*, that these letters amounted to a sufficient promise, founded upon a good consideration, to take the case out of the Statute of Limitations. Wilby *v.* Elgee - - - - - - 497

SERVICE—Articled clerk - - - 569
See Service by Articled Clerk.

SERVICE BY ARTICLED CLERK—*Attorney—Stamping Articles of Clerkship—Computation of Service.*] The Court will allow the service under articles of clerkship to be computed from their date, notwithstanding the stamp-duty thereon has not been paid within the proper period, provided the failure to pay it has arisen from some unforeseen circumstance over which the party had no control.—Therefore, where the failure had arisen from the non-payment of a debt due to the clerk, which he had a reasonable expectation to obtain in time, the excuse was held sufficient. In re William Sayer - - - - 569

SERVICE OF NOTICE OF OBJECTION — Post Office - - - - - 297
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SIMONY—*Quare Impedit—Estate for Life in an Advowson—Next Presentation—Right of Patron to present Himself—Simoniacal Contract within* 12 *Anne, st.* 2, *c.* 12, *s.* 2.] The purchase of an "estate for life in an advowson" is not the purchase of a "next presentation" or "next avoidance," within the meaning of 12 Anne, st. 2, c. 12, s. 2, though there be only *one* avoidance during the life-time of the cestui que vie,—the statute applying only to chattel interests.—In quare impedit the declaration stated that S., being seised for life of an advowson, conveyed it to the plaintiff by deed for his life, for 3000*l.*; that, during the life of S., the incumbent died, whereby it belonged to the plaintiff to present a fit clerk, but the defendant, the bishop, hindered him.—First plea,—that, the church being so vacant, and the plaintiff being so seised, the plaintiff presented himself for admission; that the vacancy caused by the death of the former incumbent was the next and only avoidance of the church which accrued to the plaintiff after his purchase of the advowson for the term aforesaid; and that such presentation of himself by the plaintiff was void by 12 Anne, st. 2, c. 12, s. 2:—*Held*, that the plea was bad, the purchase of the life-estate of S. being a purchase of an "advowson," and not of a "next presentation," and therefore not a simoniacal contract within that statute.—Second plea,—that, the church being vacant, the plaintiff offered himself to the defendant as ordinary for admission, and prayed the defendant as such ordinary to admit and institute him thereto, which the defendant refused, as he lawfully might, but was ready to admit and institute a fit clerk, other than the plaintiff himself, upon the presentation of the plaintiff:—*Held*, that the plea was bad, inasmuch as, by the common law, a clerk who is seised of a freehold estate in an advowson may, upon a vacancy, offer himself to the bishop and pray to be admitted, and the bishop has no absolute discretion to admit or to reject him.—*Semble*, that the plea should have shewn the grounds of the bishop's refusal to present the plaintiff. Walsh *v.* The Bishop of Lincoln - - - - - 518

SOLICITOR—Articled clerk—Enrolment of articles - - - - - 638
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—— Articled clerk—Service - - 569
See Service by Articled Clerk.

—— Lien for costs - - - - 397
See Solicitor's Lien.

SOLICITOR'S LIEN—*Attorney's Charge for Costs on "Property recovered"—Attachment of Debts—Priority—*23 *&* 24 *Vict. c.* 127, *s.* 28—*Common Law Procedure Act*, 1854, *s.* 61.] The defendant having recovered a sum of money in an action brought by him against M., B., the defendant's attorney in that action, had taken out a summons for an order charging his costs in such action upon the sum recovered. The plaintiff afterwards, having recovered judgment in his action against the defendant, obtained an ex parte garnishee order attaching the sum recovered by defendant against M. in execution. Under these circumstances the parties came before a judge at Chambers, B. claiming to have charging order on the judgment debt as property recovered within

SOLICITOR'S LIEN—*continued.*
the 28th section of 23 & 24 Vict. c. 127, and the plaintiff claiming an order on M. to pay the sum attached to him. The judge made an order in favour of B.:—*Held*, that he was right in so doing; that the sum recovered was property within the section, and that the attorney was entitled to priority. Birchall *v.* Pugin - 397

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TRESPASS—*Animal, Owner liable for trespass of —Negligence.*] The defendants' horse having injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendants' :—*Held*, that there was a trespass by the act of the defendants' horse, for which the defendants were liable, apart from any question of negligence on the part of the defendants. Ellis *v.* The Loftus Iron Company 10

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VOTE FOR PARLIAMENT—*Borough Vote—Occupation as Tenant under s. 3 of the Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102).] A sergeant on the permanent staff of the W. Militia as such occupied a house close to the premises in which the arms, accoutrements, &c., of the corps were stored, which was built expressly for the accommodation of the men employed in looking after the stores, under the provisions of the Militia Act, 1854. The house was assigned to him by the commanding officer as a place to live in; and, if he left it without the permission of his officer, he would be guilty of a breach of discipline for which he would probably be dismissed the service; and he was liable to be turned out at any time. He had 2*s.* 4*d.* per week deducted out of his pay, as occupier of the house; but he would not receive the 2*s.* 4*d.* extra if he resided elsewhere. He could perform the duties required of him equally well if he were living elsewhere, which he might do with his officer's permission :—*Held*, that the sergeant did not occupy the premises as tenant, within the meaning of s. 3 of 30 & 31 Vict. c. 102.—*Dobson* v. *Jones* (5 M. & G. 112), followed. Fox *v.* Dalby - - 285

2. —— *County Vote—Notice of Objection sent by Post—Proof of Service*, 6 *Vict. c.* 18, *s.* 100.] The place of abode of a county voter as described in the list of voters was W. To prove service of a notice of objection the duplicate addressed to the voter at W. was produced, and it was proved that the notice had been posted in time to reach E., which is the nearest post-town to W., on the morning of the 19th of August, by the ordinary course of post; but W. was two miles distant from E., and there was no delivery of letters at W., and, unless by some private accidental conveyance, the voter would not receive the notice :—*Held*, that the above was no evidence, under 6 Vict. c. 18, s. 100, of the notice having been given to the voter at W., in the ordinary course of post, on or before the 20th of August. Lewis *v.* Evans - 297

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LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.

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L 30 JUN1964